Supreme Court, U.S.
FILED

10-913 JAN 11 2011

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No. ____

In the
Supreme Court of the United States

HERAND ABCARIAN, M.D., F.A.C.S.,
Petitioner,

v.

TIMOTHY MCDONALD, M.D., J.D., PATRICIA KALE, WILLIAM H. CHAMBERLIN, JR., M.D., NIKKI CENTOMANI, STUART ALLEN, BARBARA MCCOLGIN, CHRIS J. MOLLET, ESQ., THOMAS R. BEARROWS, ESQ., CHRISTINE FLANIGAM,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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January 11, 2011

QUESTIONS PRESENTED

1. Whether *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 128 S.Ct. 2146 (2008), can be extended beyond the public employer context to preclude class-of-one equal protection claims of a government employee against his co-employees acting outside the scope of their agency.

2. Whether *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), bars a government employee from bringing a First Amendment retaliation claim against his co-employees for actions outside the scope of their authority.

3. Whether the court should address the "important ramifications for academic freedom" noted but not ruled upon in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006).

4. Whether a plaintiff should be allowed to amend his complaint when, due to the plausibility pleading standard articulated in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), a district court considers matters outside the record in its decision to dismiss the complaint and where the plaintiff can plead additional facts to state a claim for relief that is plausible on its face.

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review judgment of the United States Court of Appeals for the Seventh Circuit in *Abcarian v. McDonald*, 617 F.3d 931 (7th Cir. 2010).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, 617 F.3d 931 (7th Cir. 2010), is reprinted at Appendix C. The Denial of Rehearing is reprinted at Appendix A. The Denial of Rehearing is unpublished. The Memorandum Opinion for the United States District Court for the Northern District of Illinois, on motion for reconsideration and leave to amend, dated August 10, 2009, 2009 WL 2448044 (N.D.Ill. 2009), is reprinted at Appendix E. The initial Memorandum Opinion for the United States District Court for the Northern District of Illinois, dated March 9, 2009, 2009 WL 596575 is reprinted at Appendix H. The district court opinions currently are unpublished.

STATEMENT OF JURISDICTION

On August 13, 2010, the court of appeals affirmed the district court's dismissal of the amended complaint and the case and its denial of reconsideration and leave to file the Proposed Second Amended Complaint. On October 13, 2010, the court of appeals denied the petition for rehearing and rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Free Speech Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves a 42 U.S.C. § 1983 claim filed by world-renown surgeon and medical professor, Herand Abcarian M.D., F.A.C.S. ("Petitioner") against several of his co-employees ("Respondents") at the University of Illinois Medical Center and College of Medicine in Chicago for retaliation against him for his First Amendment free speech, and for treating him differently than other physicians as a result of personal animus.

Petitioner filed a complaint in the United States District Court for the Northern District of Illinois. After Respondents moved to dismiss, the district court allowed Petitioner leave to file his First Amended Complaint without ruling on the merits. The district court then granted Respondents' motion to dismiss the First Amended Complaint and denied Petitioner's motion to alter or amend the judgment pursuant to Fed. Rules Civ. Pro., Rule 59(e) and for leave to file Proposed Second Amended Complaint pursuant to Fed. Rules Civ. Pro., Rule 15. Petitioner

appealed this dismissal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed and denied rehearing and rehearing en banc. This petition for writ of certiorari was timely filed.

Initially it is to be noted that this case does not involve any action taken against Petitioner by his *employer*. The Respondents in this case had no supervisory position or disciplinary powers over Petitioner; they could not fire him, reduce his pay, or initiate any other employer disciplinary action against him. Instead, it concerns actions by fellow *co-employees* who conspired to dishonor and damage Petitioner professionally in the only way they could - by falsely reporting to governmental license and reporting agencies the non-existent settlement of a medical malpractice case against him. [1]

In this case, Respondents settled on behalf of the Board of Trustees of the University of Illinois a medical malpractice suit which they conspired to have filed for the Estate of John H. Bezhad against Petitioner. Concurrent with the settlement by the Board of Trustees, Respondents instructed the claimant's attorney to file suit against Petitioner but not to serve him with process.[2] Respondents then falsely reported the settlement of the lawsuit by the Board of Trustees as a settlement made on behalf of

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[1] The facts of the underlying case are summarized at Appendix J, pp. 75a-76a.

[2] Petitioner only discovered this lawsuit when the medical licensing and reporting agencies began an investigation of Petitioner's fitness to practice medicine.

Petitioner to the medical licensing and reporting agencies. Respondents, however, did not have authority to make any such reports, particularly not false reports, nor had these employees nor the Board of Trustees ever reported even a single physician to the licensing and reporting authorities, other than Petitioner. Furthermore, this report was entirely false as Petitioner was not a party to the settlement and the lawsuit was a sham.[3]

These actions were motivated by Respondents' personal animus against Petitioner for speaking out as a citizen about various issues involving the Respondents including: opposition to the waste of public funds to build an office suite for two Respondents, opinions that physicians (including one of the Respondents) with substance abuse problems should lose clinical privileges, and opposition to issues regarding allocation of compensation and fringe benefits as well as increased medical malpractice premiums. As Petitioner made clear in his Proposed Second Amended Complaint, which he was denied leave to plead, the Statutes of the University of Illinois provided that as a tenured professor, he could not be disciplined by anyone for his expressions of free speech nor could he be disciplined for any other reason except by the President of the University with the concurrence of the Board of Trustees. Thus, in retaliating against Petitioner for his speech, Respondents were acting

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[3] Contrary to the footnote in the Seventh Circuit's opinion below, the Illinois Appellate Court found: "defendant was not a party to the settlement agreement." Bezhad v. Abcarian, No.1-07-1357, slip op. (Ill. App. 1st Dist. May 19, 2008) Appendix I, p. 71a.

outside the scope of their authority. They were not Petitioner's employer and had no authority to discipline him.

Furthermore, as a member of the academic staff, the Statutes specifically provided for "full freedom within the law of inquiry, discourse . . . and to protect any member of the academic staff against influences, from within or without the University, which would restrict the member's exercise of these freedoms in the member's area of scholarly interest." Moreover, this Statute specifically provided: "As a citizen, a faculty member may exercise the same freedoms as other citizens without institutional censorship or discipline."

REASONS TO GRANT THE PETITION

Petitioner in this case was part of the public sector workforce as Chief of Surgery and a tenured professor of medicine at a public university medical center and college of medicine. The Bureau of Labor Statistics reported that as of December 2008, there were 21,114,528 public employees. In that year, 139,877,000 people were employed in the United States.[4] Any decision about public employees, therefore, has an enormous impact since 15 percent of employed people in the United States worked in the public sector in 2008 and the public sector workforce continues to grow in size and percentage of employed persons. This Court should grant this

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[4] Bureau of Labor Statistics, Labor Force Statistics, Table A-1. Employment Status of the civilian population by sex and age, www.bls.gov/webapps/legacy/cpsatab1.htm (last visited January 4, 2010).

petition to determine how *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 128 S.Ct. 2146 (2008), and *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), apply outside the public employer context when government workforce co-employees exceed the scope of their authority. Additionally, it is important to determine the issue presented of free speech in an academic setting. Furthermore, given the new pleading standard articulated in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), this Court should determine when plaintiffs should be allowed to amend their complaint to refute a district court's speculation of their job duties.

I. This petition should be granted to determine whether *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 128 S.Ct. 2146 (2008), can be applied to class-of-one equal protection claims outside of the public employer context.

When a plaintiff alleges that she has been intentionally treated differently from other similarly situated individuals and that there is no rational basis for the different treatment, a class-of-one equal protection claim may be brought. *City of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000). Such a theory, however, does not apply to government employees for disciplinary or job-related decisions against him by his employer. *Engquist*, 553 U.S. at 606, 128 S.Ct. at 2156. While this Court limited its holding to claims of a government employee against his government employer, circuits in the United States Court of Appeals have expanded this

reasoning to bar class-of-one claims involving other inherently subjective, discretionary governmental decisions. *See, e.g., Flowers v. City of Minneapolis*, 558 F.3d 794, 799-800 (8th Cir. 2009) (class-of-one claims do not apply to police officers for their discretionary investigative decisions); *see also Douglas Asphalt Co. v. Qobe Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2009) (class-of-one claims do not apply to government contractors); *United States v. Moore*, 543 F.3d 891, 900-01 (7th Cir. 2008) (class-of-one claims do not apply in criminal sentencing decisions); *but see Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 142 (2d Cir. 2010) (refusing to extend *Engquist* to bar a class-of-one claim against a government agency for increased scrutiny against a laboratory). This Court, however, should determine when, if at all, *Engquist* can be expanded.

In *Engquist*, this Court determined that class-of-one equal protection claims do not apply to a public employee against his employer. 553 U.S. at 606, 128 S.Ct. at 2156. This Court noted the distinction between the government regulating and the government managing its internal operation. *Id.* at 598, 128 S.Ct. at 2151. It acknowledged that the government has broader power as an employer than as a sovereign. *Id.* Thus, the class-of-one theory, which purports that similarly situated people treated differently are entitled to at least a rational reason for the difference, is a poor fit for the employment context. *Id.* at 601, 128 S.Ct. at 2153. When a government employer treats a public employee differently, it is only exercising broad discretion that is within the nature of any action in the employment context. *Id.* at 605, 128 S.Ct. at 2155.

To further explain its point, this Court, in dicta, stated:

> "There are some forms of state action, however, which by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id.* at 603, 128 S.Ct. at 2154.

Furthermore, this Court gave an example that it would be improper to challenge a police officer's decision to ticket a particular speeder when he let other speeders go because the "nature is a subjective, individualized decision." *Id.*, 128 S.Ct. at 2154.

In response to this dictum, lower courts have expanded the holding in *Engquist*, despite the statement that it was limited to claims against public employers acting as employers. The Seventh Circuit in this case stated that it had "interpreted *Engquist* to stand for the broad proposition that inherently subjective discretionary governmental decisions may be immune from class-of-one claims." *Abcarian v. McDonald*, 617, F.3d 931, 939 (7th Cir. 2010); *see also United States v. Moore*, 543 F.3d at

900-01 (applying *Engquist* to sentencing decisions in criminal cases); *but see Hanes v. Zurick*, 578 F.3d 491, 495-96 (7th Cir. 2009) (finding that the class-of-one theory can apply to a police officer who repeatedly arrested the plaintiff without probable cause). Other circuits also have expanded this holding to other discretionary governmental action. *Flowers*, 558 F.3d at 799-800 (holding that *Engquist* bars class-of-one claims involving a police officer's investigative decision); *Douglas Asphalt Co.*, 541 F.3d at 1274 (finding *Engquist* bars class-of-one claims of government contractors).

The Second Circuit, however, refused to extend *Engquist* outside the employer context. *Analytical Diagnostic Labs*, 626 F.3d at 142. The court reasoned that *Engquist* was decided based on three reasons. *Id.* First, because employment decisions are subjective and individualized, and rely on factors that are difficult to articulate and quantify, they are unsuited for the class-of-one theory. *Id.* Furthermore, the government is given wider latitude as an employer than as a regulator. *Id.* Finally, this Court did not want to make a constitutional claim out of every employment dispute. *Id.* The Second Circuit found, however, that this decision does not bar class-of-one claims of *all* discretionary government actions. *Id.* Therefore, in the context of its case, where a government agency subjected a laboratory to more rigorous scrutiny, a class-of-one claim was available. *Id.* However, the Second Circuit did not rule out an expansion of *Engquist* in some circumstances. *Id.*

The trend, therefore, is clear. Lower courts are expanding the *Engquist* holding beyond the

employment context. *See* Robert C. Farrell, *The Equal Protection Class of One Claim: Olech, Engquist, and the Supreme Court's Misadventure*, 61 S.C. L. Rev. 107 (2009). This Court should grant this petition to determine to what extent, if any, *Engquist* can be extended beyond employer decisions.

Since the lower courts are expanding the holding of *Engquist* despite an explicit statement that the decision is limited to class-of-one cases in the employment context, they are not acting properly. These lower courts are using court dicta to trump the holding of a case; a method that is not good jurisprudence. Darien Shanske, *Engquist and the Erosion of the Equal Protection Clause: An Attempt to Stop the Creep of Irrational Dicta*, 61 Hastings L. J. 969, 982 (2010). This Court is the only authority that should expand its holdings.

Also, there are many other considerations involved in expanding *Engquist* that this Court did not take into account when it decided the case on narrow grounds. For example, any decision that bars class-of-one claims implicates the issue of immunity; it can turn areas of qualified immunity into absolute immunity – an act that should be done with caution by this Court. *Id.* at 983. Moreover, this Court should decide which standard governs whether a class-of-one claim is barred – not the lower courts. *Id.* Additionally, if this Court were to decide on the discretion standard employed by some of the lower courts, it would have to harmonize the standard with other areas that determine whether a

government function is discretionary.[5] Utilizing this standard in class-of-one equal protection cases would add more litigation to the area; this Court should decide whether this is necessary.

This case presents a different issue than in *Engquist*. Here, Respondents were *not* government employers. Rather, they were fellow citizen employees acting outside their job duties and not carrying out their employer's policies. As employees, therefore, they do not need more leeway to manage internal operations. Furthermore, it was not an action where they had no discretion but instead their actions were entirely illegitimate, malicious and false. Accordingly, the co-employees were not acting as agents of their employers, just as police officers who use excessive force on arrestees are not acting in furtherance of their employer's policies and are acting outside of the protection of the law. Co-employees should not receive the same leeway as those with employer supervisory responsibility to manage the internal operations of a government function since they are not in charge of managing any aspect of the workplace at all.

This Court, therefore, should grant this petition to determine whether *Engquist* can be expanded to bar class-of-one claims of a government employee against co-employees acting outside of their job duties and to determine whether *Engquist* should be expanded at all.

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[5] This Court has utilized the discretionary function distinction in municipal tort liability under state law, federal due process cases, and federal tort liability under the Federal Tort Claims Act. See: Shanske, 61 Hastings L. J. at 984.

II. This petition should be granted to determine whether *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), bars First Amendment retaliation claims of a government employee against his co-employees acting outside the scope of their employment.

This Court has consistently treated constitutional review of issues with the public sector workforce as a distinct class of cases. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878, 1885 (1994) (plurality opinion) ("government as an employer indeed has far broader powers than does the government as a sovereign"). Thus, in the free speech context, this Court has held that the First Amendment does not apply to statements of a public employee made pursuant to his job responsibilities and duties. *Garcetti v. Ceballos*, 547 U.S 410, 421, 126 S. Ct. 1951, 1959 (2006). The Seventh Circuit, in turn, has read the *Garcetti* opinion broadly; it applies to *all* public employees speaking pursuant to their official duties. *Speigla v. Hull*, 481 F.3d 961, 965 (7th Cir. 2007). The Seventh Circuit reasons that *Garcetti*, therefore, also extends to co-employees whose actions advance the employer's interest in maintaining an orderly workplace. *Fairley v. Andrews*, 578 F.3d 518, 524 (7th Cir. 2009). The Seventh Circuit in this case, however, refused to decide whether *Garcetti* broadly applies to all instances of co-employee retaliation. *Abcarian*, 617 F.3d at 937. Due to the enormous number of people affected by decisions about the public sector workforce, this Court should grant this petition to determine this issue.

Garcetti was decided based on the premise that government employers must be given discretion to manage their operations. 547 U.S. at 422, 126 S.Ct. at 1960. The rule is meant to promote workplace order, tranquility, and efficiency. *See id.*, 126 S.Ct. at 1960. Government employers, just like employers in privately owned business, must be able to discipline their employees whose actions are detrimental to the functioning of the employer or agency. However, applying the *Garcetti* rule to *everything* in the public employment context, rather than just instances of job discipline involving an *employer*'s action against an employee acting contrary to the employer's directions or interests, has an adverse effect.

In an age where corruption is rampant, such a rule chills government employees from blowing the whistle on other employees. *See* Howard Kline, *Garcetti v. Ceballos: The Cost of Silencing Public Employees*, 28 L. J & Com. 75 (2009). If a public employee blows the whistle on a co-employee for fraud or corruption in the workplace, the speech is most frequently within his job duties, and therefore not protected by the First Amendment under the *Garcetti* rationale despite being a matter of high public concern. *Id.* at 83. Thus, co-employees will have free reign to retaliate against their colleagues for reporting them; this gives employees little incentive to alert the proper authorities of fraud or other wrongdoing. *Garcetti*, therefore, should not apply when co-employees are involved.

Furthermore, allowing such retaliation on the part of co-employees is contrary to the principles set forth in *Garcetti* and will result in workplace chaos.

Co-employees will conspire against their fellow employees, such as here, creating a tense, cut-throat work environment where no one can be productive. Accordingly, the holding in *Garcetti* should be interpreted to allow the First Amendment to apply in this and similar situations. This Court should grant this petition to decide this issue and to protect millions of Americans who work in the public sector.

III. This petition should be granted to determine the "important ramifications for academic freedom" associated with control of free speech in an academic setting noted but not ruled upon in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006).

This case arises not just in a government agency but in a public university hospital and medical school. In *Garcetti*, the majority noted that "expressions related to academic scholarship or classroom instruction implicate additional constitutional interests that may not be fully accounted for by this Court's customary employee-speech jurisprudence." *Garcetti*, 547 U.S. at 425, 126 S.Ct. at 1962. In his dissent, Justice SOUTER, joined by Justices STEVENS and GINSBURG, said, "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'" *Garcetti*, 547 U.S. at 438, 126 S.Ct. at 1969.

In addition to its very significant impact on the public sector workforce, this case also implicates

academic freedom. Petitioner was a professor at a public university hospital and medical school. It was explicit, written academic policy that Petitioner could speak freely on all matters and not be disciplined for anything he said.[6] However, even though his employer could not discipline him, co-employee Respondents retaliated against him for his speech. Allowing co-employees in the academic field to utilize such tactics with impunity under the aegis of workplace discipline will have a detrimental effect on academic expression. The Seventh Circuit gave short shrift to this concern, footnoting that Petitioner's "speech involved administrative policies that were much more prosaic than would be covered by principles of academic freedom," even though Petitioner's specific speech was not quoted in the pleadings. Appendix C, p. 15a.

In order to define the parameters of "academic speech" and to protect academic freedom, this Court should grant this petition to decide the issue of how the *Garcetti* rule applies to speech in connection with academic freedom, activities, scholarship and classroom instruction. As this Court noted, academic speech may raise additional interests not accounted for by *Garcetti*, and this issue should be decided to eliminate improper and undesirable chilling of academic expression. *See Garcetti*, 547 U.S. at 425, 126 S.Ct. at 1962.

IV. This petition should be granted to determine whether a plaintiff should be allowed to

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[6] Petitioner attempted to plead these facts in his Proposed Second Amended Complaint, which the district court denied leave to plead. Appendix J, pp. 81a-84a.

> amend his complaint after a district court, pursuant to the pleading standard established by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) dismissed the complaint and where the plaintiff can plead the relevant facts needed to state a claim for relief that is plausible on its face.

Prior to *Bell Atlantic* and *Iqbal*, interpretation of the Federal Rules of Civil Procedure was premised on the idea that all parties and claims should be treated equally, the ends of justice should be promoted rather than sacrificed to technical decision making, and the legal rights of citizens should be enforced so that they have access to the courts. Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L. J. 1, 4-6 (2010). However, *Twombly* and *Iqbal* are the latest in a trend to end cases early in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits. *Id.* at 10-16.

Since *Iqbal*, lower courts have struggled with the issue of how to draw the fact-conclusion distinction. *Id.* at 22. This is a particularly difficult distinction to draw when the issue is whether or not an employee is acting within the scope of his employment. This court has held that job descriptions "bear little resemblance to the duties an employee is actually expected to perform." *Garcetti*, 547 U.S. at 425. Despite the fact that Federal pleadings are notice pleadings, the courts are transforming arguably factual allegations into legal conclusions so as to disallow the claim. *See, e.g.*,

Maldonado v. Fontanes, 568 F.2d 263 (1st Cir. 2009) (characterizing some allegations as "conclusory" before determining whether the remaining facts stated a claim); *Knaus v. Town of Ledgeview*, 2010 WL 2640272 (E.D. Wis. June 24, 2010) (calling allegations "conclusory"); *Ocasio-Hernandez v. Fortuno-Burset*, 639 F. Supp. 2d 217, 222 (D.P.R. 2009) (calling allegations "generic" and "conclusory"). Furthermore, the ruling on a motion to dismiss now turns on pre-judicial life experiences or on individual ideology regarding the claims being advanced or upon personal attitudes of the district court rather than the well-pleaded allegations of the complaint; complaints are no longer being viewed in the light most favorable to the plaintiff. Arthur Miller, 60 Duke L. J. at 28. Essentially, lower courts have transformed the motion to dismiss into a motion for summary judgment. *See id.* Petitioner made that very argument to the district court in his unsuccessful motion for reconsideration under Fed. Rules Civ. Pro 59 (e) and for leave to file his Proposed Second Amended Complaint under Fed. Rules Civ. Pro 15. In response, the district court retorted that "the district court did what it is supposed to do by basing its opinion on a through review of all the allegations in Abcarian's 48-page amended complaint." Appendix E, pp. 35a-36a. But it did not actually do that since Petitioner had specifically pleaded that his speech was made as a citizen in the exercise of his rights to free speech on matters of public concern under the First Amendment. Petitioner did not enumerate his job duties in his amended complaint. The district court speculated as to Petitioner's job duties based upon his position in the university. The district court ignored Petitioner's factual allegations of free speech

as being a mere conclusion and found that his speech was made as part of his official duties. Appendix H, p. 56a. Thus the district court's plausibility determination was apparently made upon its speculation, based upon his official titles. Appendix H, p. 57a. Unfortunately, as here, in motions to dismiss, unlike summary judgment, plaintiffs are not allowed to provide additional facts, and trial judges are speculating on facts outside the four corners of the complaint to dismiss cases. Miller, 60 Duke L. J. at 28.

In this case, the district court, in attempting to determine if Petitioner's complaint passed the plausibility standard, speculated on Petitioner's job responsibilities and therefore erroneously determined that Petitioner was speaking as part of his official duties, even though he pleaded that his speech was as a private citizen. If Petitioner had been granted the opportunity to file his Proposed Second Amended Complaint,[7] that pleading would have set forth the University Statutes granting him unrestricted free speech and freedom from discipline for such speech, thereby eviscerating any basis for the district court to find that speech was part of his job and thus subject to discipline pursuant to *Garcetti*. Appendix J pp. 81a-84a. Such allegations concerning the Statutes of the University guaranteeing that Petitioner could not be disciplined for free speech were not relevant until the district

[7] The Proposed Second Amended Complaint abandoned the claim against the Board of Trustees of the University of Illinois, a claim premised upon ratification by the Board of the misconduct by the co-employees and joinder in the conspiracy against Abcarian. Appendix J. It also alleged that his speech was not part of his official duties. Appendix J, p. 76a.

court made them so when it ignored his allegation that he was speaking as a private citizen and dismissed Petitioner's complaint. But it then also foreclosed him from filing his Proposed Second Amended Complaint which would have established that his job did not include speech and he could not be disciplined for anything he said. Appendix J, pp. 81a-84a. The Seventh Circuit then compounded this injustice by faulting Petitioner for not making factual allegations which would have been contrary to the district court's speculation about his job duties, allegations he was prohibited from pleading. Appendix C, p. 15a.

While this Court may continue to impose a plausibility pleading standard in Civil Rights cases, it should temper such standard with a caution to the courts below to liberally allow amendment to the pleadings in order to correct misapprehension by the district courts of facts such as job duties. It is common sense to recognize that there is not a level playing field in the area of Civil Rights cases, cases which are fundamental to our basic principles of constitutional government. The state and municipal defendants in such cases are often repeated defendants, ably represented by cadres of litigators with considerable accumulated experience in such litigation. Plaintiffs, on the other hand, are frequently represented by yeoman trial lawyers whose ordinary stock in trade is wrongdoing of all descriptions, without special expertise in Civil Rights cases. Add to this the fact that there is an enormous body of case law in the field of Civil Rights that requires considerable scholarship to master. Thus, the job of plaintiff's counsel is one where the district courts should exercise some understanding

and accommodation. Liberal amendment of pleadings should be allowed in such cases to substitute parties and change theories as the pleadings are honed to present a triable case. This Court, therefore, should grant this petition to determine whether plaintiffs should be allowed to amend their complaints after the court rules on motions to dismiss based on what the court conjectures to be relevant, in order to avoid unpredictability and speculation in the lower courts.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

October 13, 2010

Before: Michael S. Kanne, Circuit Judge
Ann Claire Williams, Circuit Judge
David F. Hamilton, Circuit Judge

No. 09-3208

HERAND ABCARIAN, M.D., F.A.C.S.,
Plaintiff-Appellant,

v.

TIMOTHY MCDONALD, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 08-CV-03843 – Judge Samuel Der-Yeghiayan

ORDER

On consideration of the petition for rehearing and rehearing en banc, filed on August 27, 2010, no judge in active service has requested a vote, and all of the judges on the original panel have voted to DENY the petition for rehearing.

Accordingly, the petition for rehearing is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FINAL JUDGMENT

August 13, 2010

Before: Michael S. Kanne, Circuit Judge
Ann Claire Williams, Circuit Judge
David F. Hamilton, Circuit Judge

No. 09-3208

HERAND ABCARIAN, M.D., F.A.C.S.,

Plaintiff-Appellant,

v.

TIMOTHY MCDONALD, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 08-CV-03843, Judge Samuel Der-Yeghiayan

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-3208

HERAND ABCARIAN,
Plaintiff-Appellant,
v.

TIMOTHY MCDONALD, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 08 CV 3843 — Samuel Der-Yeghiayan, Judge

Argued April 22, 2010—Decided August 13, 2010

Before Kanne, Williams, and Hamilton,
Circuit Judges.

HAMILTON, *Circuit Judge*. After learning that the settlement of a medical malpractice claim against him had been reported to state and national professional authorities, Dr. Herand Abcarian filed this suit against the University of Illinois and a number of its employees alleging numerous violations of his constitutional rights. The district court dismissed the amended complaint in its entirety and entered a judgment dismissing the case.

Abcarian then moved the district court to reconsider its ruling and allow him to amend his complaint again, but the district court denied that motion.

We affirm in all respects. Abcarian's own complaint shows that the defendants merely complied with legal requirements for filing notices of medical malpractice settlements with federal and state authorities. By filing those notices, the defendants did not violate Abcarian's free speech rights or his rights to equal protection of the law and due process of law.

Plaintiff's Allegations

Because the district court granted the defendants' Rule 12(b)(6) motion to dismiss, we take the complaint's well-pleaded factual allegations as true and draw all reasonable inferences in Abcarian's favor from those allegations. *London v. RBS Citizens, N.A.*, 600 F.3d 742, 745 (7th Cir. 2010). Where those allegations are contradicted by written exhibits that Abcarian attached to his amended complaint, however, the exhibits trump the allegations. See *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 455 (7th Cir. 1998). We review de novo the district court's grant of a motion to dismiss for failure to state a claim. *United States v. Lewis*, 411 F.3d 838, 841-42 (7th Cir. 2005), citing *Olson v. Wexford Clearing Servs. Corp.*, 397 F.3d 488, 490 (7th Cir. 2005).

At all relevant times, Abcarian was Head of the Department of Surgery at the University of Illinois College of Medicine at Chicago and Service Chief of

the Department of Surgery of the University of Illinois Medical Center at Chicago. During his tenure, Abcarian and the individual defendants—who were all University employees—clashed over a number of issues including risk management, faculty recruitment, compensation and fringe benefits, other issues that Abcarian vaguely refers to as managerial obstruction of "numerous needed changes," and medical malpractice insurance premiums.

In 2005, Abcarian was notified that a lawsuit was being contemplated against him based on the death of John Behzad, a former patient. When the defendants learned of this potential lawsuit, says the complaint, they conspired together to use that suit to discredit Abcarian's reputation. As part of this alleged conspiracy, the University executed a settlement agreement with John Behzad's son David Behzad. The agreement released the University and its employees and agents (implicitly but undoubtedly including Abcarian) from any and all claims arising out of John Behzad's death in exchange for a payment of $950,000.[1]

Abcarian alleges that the execution of this settlement agreement was the first step in a

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[1] Abcarian alleges that there was no settlement on his behalf, but this allegation need not be taken as true because it is directly contradicted by the settlement agreement attached to his amended complaint. See Northern Indiana Gun & Outdoor Shows, 163 F.3d at 454. The fact that Abcarian was a third-party beneficiary to the settlement agreement rather than an actual signatory does not render the settlement a nullity. See, e.g., Martis v. Grinnell Mut. Reinsurance Co., 905 N.E.2d 920, 924 (Ill. App. 2009).

conspiracy to destroy his reputation and career. How could a settlement advance the conspirators' goal of discrediting Abcarian? Abcarian's answer to this question is that the defendants entered into the settlement agreement and paid Behzad nearly a million dollars merely so they could report the settlement of a medical malpractice claim against Abcarian to the Illinois Department of Financial and Professional Regulation ("IDFPR") and the National Practitioner Data Bank ("NPDB").[2] Upon receiving those reports, both the IDFPR and the NPDB asked Abcarian to provide information about the settlement.[3] The IDFPR told Abcarian that a failure to provide a timely response to its request could result in disciplinary action. Abcarian does not allege, however, that any formal disciplinary proceedings were ever initiated against him, let alone that any formal disciplinary sanctions were imposed.

The alleged conspiracy to destroy Abcarian's professional reputation did not end with the reporting of the settlement, according to Abcarian. The same day

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[2] The NPDB is "an alert or flagging system" intended to assist state licensing boards and other entities conduct independent investigations into the qualifications of health care practitioners. U.S. Dep't of Health and Human Services, NPDB GUIDEBOOK, A-3, *available at* http://www.npdb-hipdb.hrsa.gov/ pubs/gb/NPDB_Guidebook.pdf.

[3] Abcarian alleges that the reports were false because there was no settlement on his behalf. Again, because the settlement agreement attached to his complaint makes clear that a settlement was made on his behalf, we do not assume the truth of this allegation. See *Northern Indiana Gun & Outdoor Shows*, 163 F.3d at 454.

that the settlement agreement was executed, the defendants directed David Behzad's counsel to file suit against Abcarian in a state trial court. They further directed Behzad's counsel not to serve Abcarian with process in that suit, but to inform the court that the matter had been settled and to request a dismissal of the lawsuit. Abcarian believes that the defendants did this to prevent him from contesting the merits of the malpractice claim.

The state trial court approved the settlement agreement and dismissed the case with prejudice. When Abcarian learned of the dismissal, he filed a petition to vacate the dismissal. He asked that the settlement be vacated and the settlement funds returned to the defendants. The defendants, through counsel, intervened to oppose this petition. The court vacated the dismissal order but declined to vacate the settlement agreement. Behzad then voluntarily dismissed his lawsuit with prejudice. The trial court's decision was affirmed on appeal, *Behzad v. Abcarian*, No. 1-07-1357 (Ill. App. May 19, 2008) (unpublished order), and the Illinois Supreme Court declined review, *Behzad v. Abcarian*, 897 N.E.2d 249 (Ill. 2008).[4]

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[4] Abcarian's allegation in his amended complaint that the Illinois appellate court held that "no settlement of any such medical negligence lawsuit has been made" misrepresents that court's holding. Abcarian's briefs make similarly misleading assertions. The appellate court noted that Abcarian "was not a party to the settlement," but it rejected Abcarian's challenge to the order approving that settlement and never addressed the validity of the settlement itself. *Behzad*, No. 1-07-1357, slip op. at 5-6. The Illinois court similarly found that Abcarian's briefs did not "convey a complete picture of the facts," in violation of state court rules. *Id.* at 6.

Abcarian then brought this lawsuit against the defendants alleging various constitutional claims under 42 U.S.C. § 1983, as well as a number of state law claims. On the defendants' motion to dismiss Abcarian's amended complaint, the district court dismissed all claims against the Board of Trustees of the University of Illinois on Eleventh Amendment grounds and dismissed all of Abcarian's constitutional claims against the individual defendants for failure to state a claim on which relief could be granted. *Abcarian v. McDonald*, No. 08 C 3843, 2009 WL 596575 (N.D. Ill. March 9, 2009). The district court then declined to exercise supplemental jurisdiction over the remaining state law claims and dismissed them without prejudice. *Id.* at *9. Abcarian later asked the court to amend its judgment and to allow him to amend his complaint again, but the court denied both requests. *Abcarian v. McDonald*, No. 08 C 3843, 2009 WL 2448044 (N.D. Ill. Aug. 10, 2009).

Abcarian appeals the district court's dismissal of his free speech, equal protection, and procedural due process claims against the individual defendants. He also challenges the court's refusal to amend its judgment under Federal Rule of Civil Procedure 59(e) and argues that the court should have permitted him to amend his complaint. He does not appeal the dismissal of his claims against the Board of Trustees or the dismissal of his substantive due process and jury trial claims.

Analysis

I. Dismissal on the Merits

First Amendment Retaliation Claim

In Count I of his amended complaint, Abcarian claimed that the defendants violated his First Amendment rights by retaliating against him for exercising his freedom of speech. The district court concluded that the Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), foreclosed this claim because all of the speech that prompted the alleged retaliation was speech in the course of Abcarian's official duties as a public employee.

On appeal, Abcarian's makes two arguments to avoid the effect of *Garcetti*. First, he argues that *Garcetti* forbids retaliation claims only against employers themselves, not against fellow employees. This is an issue on which we reserved judgment in *Fairley v. Andrews*, 578 F.3d 518, 524 (7th Cir. 2009). Second, he argues that even if *Garcetti* reaches retaliation claims against other employees, it does not foreclose his claim because his speech did not "owe[ ] its existence" to his professional responsibilities. See 547 U.S. at 421.

Garcetti held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* The case arose when a state prosecutor brought a First Amendment retaliation claim arising out of discipline imposed on him after he drafted a memorandum questioning the validity of a search warrant obtained in a pending criminal case. *Id.* at 413-15. The Supreme Court rejected his

claim. Although the Court noted employers' heightened interest in controlling employee speech when necessary to manage workplace operations, it focused on the fact that restricting speech made pursuant to employment duties "does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421-23. As a result, the Court rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties." *Id.* at 426.

Plaintiff Abcarian seeks to narrow *Garcetti* to apply only to claims against the employer as an entity, while still allowing claims against individual co-employees who acted as agents of the employer. We are not persuaded. It would be difficult to reconcile *Garcetti* with a broad rule permitting retaliation claims against co-employees in all circumstances. Although the Supreme Court couched its analysis in the context of the employer-employee relationship, it indicated that employees speaking pursuant to their official duties do not speak as citizens for purposes of the First Amendment. *Id.* at 421. For this reason, we have read *Garcetti* broadly. See, *e.g.*, *Spiegla v. Hull*, 481 F.3d 961, 965 (7th Cir. 2007) ("*Garcetti* made clear that public employees speaking 'pursuant to their official duties' are speaking as employees, not citizens, and thus are not protected by the First Amendment regardless of the content of their speech.").

In *Fairley*, on which Abcarian primarily relies, the plaintiffs brought First Amendment retaliation claims against both their employer and their co-employees. 578 F.3d at 520-21. Although we

questioned the applicability of *Garcetti* to all acts of non-employers, we observed that the co-employee defendants in *Fairley* were "merely enforcing [the employer's] policy." 578 F.3d at 524. Because their actions were allegedly condoned by their employer, who was himself immune from liability under *Garcetti,* we held that the co-employee defendants were also immune from liability. We explained this conclusion by noting the significant difference between co-employees who "try to subvert the employer's policies" and co-employees who merely "enforce" the employer's policies. *Id.* Applying this distinction, we reinstated claims against co-employees who allegedly bullied and threatened the plaintiffs to deter them from testifying against other employees in a civil rights lawsuit. We reasoned that the duty to provide testimony is better understood for these purposes not as a job duty, something done for the benefit of the employer, but as a duty that any person owes to the court, something done for the rule of law. *Id.* at 524-25.

In essence, *Fairley* held that the reasoning of *Garcetti* reaches claims against employers and also claims against co-employees whose actions directly advance the employer's interest in maintaining an orderly workplace. This would apply when the co-employee acts under instructions from, with express approval of, or in clear accordance with the policies set out by the employer itself. In such circumstances, the co-employee's actions implicate the employer's administrative interests so squarely as to require application of *Garcetti* for the benefit of the co-employee. Suppose, for example, that the prosecutor in *Garcetti* had been reported (in compliance with the employer's written policies) by a coworker for his

behavior and had been disciplined then. Under Abcarian's proposed narrow interpretation of *Garcetti*, the employer would be immune from a retaliation claim but the co-worker would not, despite the fact that he acted only to further the employer's interests. Such a rule would be at least as disruptive to workplace discipline as would a rule allowing retaliation suits against the employer itself—exactly contrary to *Garcetti*. Although employers could still respond to workplace complaints without fear of suit, we could expect that complaints would be made less frequently because of the other employees' fear of being sued by their co-workers. Less able to rely on its own employees to provide necessary information on which to base its disciplinary decisions, the employer would be in practically the same position, from a managerial standpoint, that it would have occupied if *Garcetti* had been decided the other way.

Accordingly, we reject Abcarian's first argument and conclude that *Garcetti* applies to the retaliation claim against the individual defendants. Abcarian specifically alleged that the Board of Trustees "adopt[ed] and ratif[ied] the actions of the conspirators as [its] official policy," forcing a conclusion that the defendants' alleged retaliatory acts advanced the Board's interests as an employer. Because *Fairley* made clear that *Garcetti* shelters employee actions in this situation, we need not decide the broader question whether *Garcetti* applies to all instances of co-employee retaliation.

Abcarian's second argument against application of *Garcetti* is that his speech was not pursuant to his official responsibilities. *Garcetti* bars retaliation

claims only if the plaintiff spoke as an employee rather than as a citizen. See *Chacklos v. Stevens*, 560 F.3d 705, 711-12 (7th Cir. 2009) ("*Garcetti* requires a threshold determination regarding whether the public employee spoke in his capacity as a private citizen or as an employee."), citing *Renken v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2009). When determining whether a plaintiff spoke as an employee or as a citizen, we take a practical view of the facts alleged in the complaint, looking to the employee's level of responsibility and the context in which the statements were made. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1092 (7th Cir. 2008).

A natural reading of the allegations in Abcarian's amended complaint indicates that he spoke while discharging the responsibilities of his office, not as a member of the general public. Abcarian was not merely a staff physician with limited authority. He was, among other things, the Service Chief of the Department of Surgery at the University of Illinois Medical Center at Chicago as well as Head of the Department of Surgery at the University of Illinois College of Medicine at Chicago. Abcarian had significant authority and responsibility over a wide range of issues affecting the surgical departments at both institutions and therefore had a broader responsibility to speak in the course of his employment obligations. The subjects on which he spoke — risk management, the fees charged to physicians, and surgeon abuse of prescription medications, among other things—directly affected both surgical departments and fell within the broad ambit of his responsibilities. This alleged speech was within the scope of Abcarian's responsibilities as an employee. See *id.* ("An employee with significant and

comprehensive responsibility ... certainly has greater responsibility to speak ...").

Abcarian's amended complaint gives us insufficient reason to believe that, despite the likelihood that he spoke in the course of his job responsibilities, he ever stepped outside his administrative role to speak as a citizen. On appeal, Abcarian admits that his amended complaint is "entirely devoid of any job description or other detail of Abcarian's affirmative duties," leaving us to speculate whether he spoke as a citizen or in the course of his employment. A mere speculative possibility that Abcarian spoke as a citizen is no longer enough to satisfy federal notice pleading requirements. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797, 804 (7th Cir. 2008); *E.E.O.C. v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776, 781 (7th Cir. 2007). Nor are Abcarian's conclusory allegations that he spoke as a citizen on matters of public concern. See *Tamayo*, 526 F.3d at 1092 (stating that a plaintiff cannot "escape the strictures of *Garcetti*" by asserting a legal conclusion that he spoke as a citizen outside the duties of his employment). The amended complaint fails to show that it is at all plausible, rather than perhaps theoretically possible, that Abcarian spoke in his capacity as a citizen when he spoke with other University employees about University affairs relevant to his job duties. See *Iqbal*, 129 S. Ct. at 1949 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully.").[5]

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[5] We also reject Abcarian's unsupported assertion that his

Because any plausible reading of Abcarian's amended complaint indicates that his speech was made pursuant to his official duties, and because Abcarian failed to make any factual allegations indicating otherwise, *Garcetti* bars his First Amendment retaliation claim. Dismissal of Count I of the amended complaint was proper.

B. *Equal Protection Class-of-One Claim*

The Equal Protection Clause of the Fourteenth Amendment most typically reaches state action that treats a person poorly because of the person's race or other suspect classification, such as sex, national origin, religion, political affiliation, among others, or because the person has exercised a "fundamental right," or because the person is a member of a group that is the target of irrational government discrimination. See generally Engquist v. Oregon Dep't of Agriculture, 553 U.S. 591, __, 128 S. Ct. 2146, 2152 (2008); Plyler v. Doe, 457 U.S. 202, 216-17 (1982); Srail v. Village of Lisle, 588 F.3d 940, 943 (7th Cir. 2009). The Supreme Court has also recognized the prospect of a so-called "class-of-one" equal protection claim. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). A class-of-one claim need not allege discrimination based on a suspect classification, but must allege that the plaintiff was singled out arbitrarily, without rational basis, for

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speech could be considered "expression related to academic scholarship or classroom instruction" possibly exempt from *Garcetti*. See 547 U.S. at 425. Abcarian's speech involved administrative policies that were much more prosaic than would be covered by principles of academic freedom.

unfair treatment. *E.g.*, *Avila v. Pappas*, 591 F.3d 552, 554 (7th Cir. 2010); see generally *Srail*, 588 F.3d at 943 (summarizing Seventh Circuit's "divergent class-of-one precedent" regarding whether illegitimate animus can substitute for absence of rational basis for state action).

Abcarian tries to take advantage of this theory in Count VI of the amended complaint, which alleges that defendants violated his equal protection rights by reporting the Behzad settlement but not the settlement of a malpractice claim against another physician. The district court dismissed Count VI and the related claim for equitable relief on the ground that Abcarian's claim was barred by the Supreme Court's decision in *Engquist*. Abcarian contends that *Engquist* applies only to class-of-one claims against governmental employers but not to claims against other government employees.

We conclude that the district court correctly dismissed the equal protection claim, but for another reason: under the law, defendants had no discretion in deciding whether to report the Behzad settlement. *Engquist* held that class-of-one claims cannot be based on the highly discretionary and individualized sorts of decisions that public employers must make about their employees. The Court pointed out that its decision in *Olech*, which first recognized class-of-one equal protection claims, rested on "the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed." 553 U.S. at ___, 128 S. Ct. at 2153. Some forms of state action "by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments." *Id.* at 2154. "[A]llowing

a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id.* "It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized." *Id.* Accordingly, the class-of-one theory of equal protection is a "poor fit" with employment decisions, which are themselves "often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Id.* at 2154-55. Based on this analysis, the Court held that "a 'class-of-one' theory of equal protection has no place in the public employment context." *Id.* at 2148-49.

We have interpreted *Engquist* to stand for the broad proposition that inherently subjective discretionary governmental decisions may be immune from class-of-one claims. See, *e.g.*, *Avila*, 591 F.3d at 554 (noting in dicta that "class-of-one claims cannot rest on governmental activity that is discretionary by design"); *Srail*, 588 F.3d at 945 (rejecting class-of-one challenge to village's "subjective and individualized" decision not to extend water services); *United States v. Moore*, 543 F.3d 891, 898-99 (7th Cir. 2008) (stating that class-of-one challenges "may be inapplicable to any governmental action that is the product of a highly discretionary decision-making process").[6] We have also recognized

[6] We do not read our cases to say, nor do we mean to imply, that *Engquist* precludes *all* class-of-one claims brought in regard to subjective governmental decisions no matter the context in which those decisions were rendered. After all, *Engquist* rested on two key premises, only one of which involved the subjectivity of employment decisions. See 128 S. Ct. at 2151 ("[T]he core concern of the Equal Protection Clause

that *Engquist* has limited applicability when a decision-maker's discretion is circumscribed by constitutional or statutory provisions. For example, because police discretion is narrowed by objective constitutional limitations such as the Fourth Amendment, not all discretionary police decision-making is immune from class-of-one challenge. See *Hanes v. Zurick*, 578 F.3d 491, 495 (7th Cir. 2009).

But when the law gives a state actor *no* discretion, it is hard to see how a person can claim irrational discrimination when the law is applied to him. State and federal law *required* the defendants to report the settlement of Behzad's malpractice claim to the relevant federal and state authorities—no matter however frivolous or insubstantial that claim may have been. See 42 U.S.C. § 11131(a) (requiring any entity making a payment in settlement of a medical malpractice claim to report certain information to the NPDB); 225 ILCS 60/23(A)(3) (requiring any entity which indemnifies a physician for his professional liability to report the settlement of a claim).[7]

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as a shield against arbitrary classifications, *combined with unique considerations applicable when the government acts as employer as opposed to sovereign*, lead us to conclude that the class-of-one theory of equal protection does not apply in the public employment context." (emphasis added)); *id.* at 215152 (explaining that, because the government has broader power when it acts as an employer, the validity of a constitutional claim in the government employment context turns on "whether the asserted employee right implicates the basic concerns of the relevant constitutional provision.").

[7] The Illinois Supreme Court recently invalidated Public Act 94677, which amended certain sections of 225 ILCS 60/23, on non-severability grounds. *Lebron v. Gottlieb Memorial Hosp.*, 2010 WL 375190 (Ill. Feb. 4, 2010). That decision

Abcarian's complaint seeks to assert a claim of selective enforcement—the enforcement of a law against only disfavored individuals—a claim long familiar in equal protection jurisprudence when based on race, national origin, or other suspect classifications. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (reversing convictions because underlying ordinance was enforced solely against individuals of Chinese ancestry). Notably, such cases are typically brought against police, prosecutors, or other individuals having discretion in the enforcement of the law. See, *e.g.*, *Wayte v. United States*, 470 U.S. 598, 608 (1985) (challenge implicating prosecutorial discretion); *Yick Wo*, 118 U.S. at 366 (challenge to ordinance vesting discretion in decision maker so great as to be considered "naked and arbitrary power"). Equal protection claims are allowed in such circumstances not because the particular law at issue is facially invalid or inapplicable to the plaintiff's conduct, but because of the concern that individuals with discretion in law enforcement will take advantage of that discretion to oppress unpopular groups.[8]

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restored the statute as it existed prior to the enactment of P.A. 94-677. See *Village of Chatham v. County of Sangamon*, 837 N.E.2d 29, 41 (Ill. 2005) (noting that invalidation of statutory amendment restores previous version of statute). The reporting requirement pre-dated the invalidated amendment, so it is still part of Illinois law.

[8] For example, the Joint Committee on Reconstruction recognized that discrimination against freed slaves and Union sympathizers was being effected not by facially discriminatory laws, but by the failure to enforce facially neutral laws in an even-handed way. See *McCleskey v. Kemp*, 481 U.S. 279, 346-47 & n.2 (1987) (Blackmun, J., dissenting); Keith S. Alexander, *Federalism, Abortion, and the Original Meaning of the Fourteenth Amendment Enforcement Power: Can Congress Ban*

But Abcarian's claim here has little in common with a typical selective enforcement claim. As we noted above, the defendants were *required* to report the settlement of Behzad's claim to the authorities. See 42 U.S.C. § 11131(a); 225 ILCS 60/23(A)(3). They had neither "naked and arbitrary" power, *Yick Wo*, 118 U.S. at 366, nor a broad discretion to act, *Wayte*, 470 U.S. at 608. Unlike a police officer or prosecutor having significant discretion as to how or whether to *enforce* the law, these defendants had no choice as to whether they *complied* with the law. If they disregarded their reporting obligations, they ran the risk of civil and criminal penalties—penalties certainly not at issue when a police officer chooses not to issue a traffic ticket or when a prosecutor declines to press charges. See 42 U.S.C. § 11131(c) (imposing civil penalty of not more than $10,000 for a failure to report); 225 ILCS 60/23(G) (making a failure to report a misdemeanor). Absent any meaningful discretion on the defendants' part to decide whether to report the settlement of a particular malpractice claim, we see little risk of the kind of discriminatory action addressed by the Fourteenth Amendment. The district court was

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Partial-Birth Abortion After Carhart?, 13 Tex. Rev. L. & Pol. 105, 125-26 (2008); see also Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 Vand. L. Rev. 409, 441 (1990) ("The framers of the fourteenth amendment understood from first-hand experience that the states could discriminate invidiously against the beneficiaries of Reconstruction, specifically blacks and those seeking enforcement of a wide variety of fundamental rights, through ... the discriminatory enforcement of racially neutral laws . . . .").

correct to dismiss Count VI of Abcarian's amended complaint and the related claim for equitable relief.

C. Procedural Due Process Claims

Abcarian's last constitutional claim is that defendants violated his right to procedural due process by reporting the Behzad settlement to state and national authorities. He now challenges the district court's dismissal of Counts II and IV and his related request for equitable relief.

A procedural due process claim involves a two-step analysis: "First, we determine whether the defendants deprived the plaintiff of a protected liberty or property interest, and if so, then we assess what process was due." *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000), citing *Hamlin v. Vaudenberg*, 95 F.3d 580, 584 (7th Cir. 1996); see *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (stating that deprivations of life, liberty, or property must be accompanied by notice and the opportunity for a hearing appropriate to the interest at issue), quoting *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).[9]

Abcarian claims that the defendants defamed him and thereby infringed his liberty to pursue his chosen occupation. The Supreme Court has made it

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[9] Abcarian claims that the defendants waived any argument regarding the existence of a protected interest by failing to raise that argument before the district court. This contention is absolutely without merit, given that the defendants devoted nearly a page of their Rule 12(b)(6) memorandum to that precise argument.

clear that defamation alone, even by a state actor, does not violate the Due Process Clause of the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693 (1976). To avoid constitutionalizing state defamation law, defamation by a government actor does not implicate the Due Process Clause unless "a right or status previously recognized by state law was distinctly altered or extinguished" as a result. *Id.* at 711; *Brown v. City of Michigan City*, 462 F.3d 720, 730 (7th Cir. 2006). To avoid this problem, a plaintiff must allege that "(1) he was stigmatized by the defendant's conduct, (2) the stigmatizing information was publicly disclosed and (3) he suffered a tangible loss of other employment opportunities as a result of public disclosure." *Townsend v. Vallas*, 256 F.3d 661, 66970 (7th Cir. 2001); *Johnson v. Martin*, 943 F.2d 15, 16 (7th Cir. 1991).

Abcarian's amended complaint shows that he cannot satisfy the third prong of this test. It is true that he has a protected liberty interest in pursuing his chosen profession, of course, but that right is not infringed by ordinary defamation or even by a serious deprivation of one's future employment prospects. *Dupuy v. Samuels*, 397 F.3d 493, 510 (7th Cir. 2005). To plead a constitutionally relevant tangible loss of his employment opportunities, Abcarian must allege that his "good name, reputation, honor or integrity [was] called into question in a manner that makes it virtually impossible for [him] to find new employment in his chosen field." *Townsend*, 256 F.3d at 670; *Head v. Chicago Sch. Reform Bd. of Trustees*, 225 F.3d 794, 801 (7th Cir. 2000); *Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997).

Abcarian cannot meet this burden for a simple and benign reason: he still has his job in his chosen profession! According to his amended complaint, he remains gainfully employed as a University of Illinois physician and professor. Although he allegedly fears that he will not be employed at *additional* health care institutions in the future, "[i]t is the liberty to pursue a *calling or occupation*, and not the right to a specific job, that is secured by the Fourteenth Amendment." *Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (7th Cir. 1992), citing *Lawson v. Sheriff of Tippecanoe County*, 725 F.2d 1136, 1138 (7th Cir. 1984). One simply cannot have been denied his liberty to pursue a particular occupation when he admittedly continues to hold a job—the same job—in that very occupation.

We pause to clarify one additional point. We have been focusing on the absence of any infringement of a liberty interest. The district court also addressed Abcarian's property interest theory. In addressing that theory, the district court erroneously concluded that our decision in *Fleury v. Clayton*, 847 F.2d 1229 (7th Cir. 1988), meant that the mere reporting of the settlement imposed a property deprivation. *Abcarian*, 2009 WL 596575, at *7. In *Fleury*, an Illinois physician had consented to a censure by state disciplinary authorities. 847 F.2d at 1230. He then sued to expunge the censure, alleging a deprivation of his right to procedural due process. On appeal, we reversed dismissal of his claim. We noted that Fleury had not been wholly excluded from his chosen profession and therefore had not been denied his liberty of occupational choice. Nevertheless, based on *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), and its progeny, we concluded

that the "criteria for professional discipline" found in Illinois statutes "creates a 'property' interest in a blemish-free license to practice medicine" because those criteria gave Fleury a "right to a particular decision reached by applying rules to facts." *Id.* at 1231-32. Absent the statute's "substantive criteria," however, he would have had no such property interest. *Id.* at 1232; see *Cain v. Larson*, 879 F.2d 1424, 1427 (7th Cir. 1989).

Read in context, the language in *Fleury* means only that an Illinois physician has a property interest in a medical license free from formal disciplinary sanction imposed without due process. A physician does not have a due process right to be exempt from the formal disciplinary processes themselves. In other words, the relevant "blemishes" are actual formal disciplinary sanctions, not the use of formal processes to resolve mere allegations of unprofessional conduct. Key to our analysis in *Fleury* was the formality of disciplinary sanctions and their possible legal consequences, contrasted with the lesser, informal consequences of mere defamatory statements. *Id.* at 1232. This distinction was significant because the defendants were members of the state medical disciplinary board that had censured Fleury. Accordingly, the "blemish-free license" language in *Fleury* is limited to defendants actually able to impose formal disciplinary sanctions and bound by the relevant substantive decision-making criteria governing the imposition of such sanctions. Only such defendants may actually "blemish" a physician's medical license in a constitutionally relevant way.

Abcarian failed to allege a deprivation of the property interest in his medical license we recognized in *Fleury*. None of the defendants named in this suit had the ability to impose sanctions. They could only report Abcarian (or, actually, report the group settlement of the malpractice claim) to the authorities, as required by law. Standing alone, such a report has no formal effect on Abcarian's license to practice medicine. Even if we suppose that the report defamed him, which is a very long stretch, mere defamation is insufficient to create a constitutionally actionable "blemish." The district court did not err by dismissing Counts II and IV of the amended complaint and the related claim for equitable relief.

II. *The Rule 59*(e) Motion and the Second Amended Complaint

Abcarian also asserts that the district court should have granted his motion to amend or alter its judgment under Federal Rule of Civil Procedure 59(e). He argues in the alternative that he did not need to bring a Rule 59(e) motion before requesting leave to amend his complaint because the district court had dismissed only his amended complaint but never entered final judgment disposing of the entire civil action.

As to Abcarian's first argument, a Rule 59(e) motion will be granted only in the case of a manifest error of law or fact, or newly discovered evidence. *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000). Abcarian claims no newly-discovered evidence, and the district court committed no error of law calling its judgment into question, let alone

any manifest error of law justifying relief under Rule 59(e).

As to his second argument, a plaintiff may amend his pleading once as a matter of course, but any additional amendments may be made only with the opposing party's consent or by leave of court. Fed. R. Civ. P. 15(a). If the plaintiff wants to amend his complaint following the entry of judgment, however, he may do so only after a motion under Rule 59(e) or 60(b) has been granted. *Sparrow v. Heller*, 116 F.3d 204, 205 (7th Cir. 1997), quoting *Figgie Int'l Inc. v. Miller*, 966 F.2d 1178, 1179 (7th Cir. 1992). Having failed to bring a successful motion under Rule 59(e), Abcarian can amend his complaint only if he is correct that no final judgment had been entered in this matter.

We have often held that the "simple dismissal of a complaint does not terminate the litigation." *E.g.*, *Benjamin v. United States*, 833 F.2d 669, 671 (7th Cir. 1987), citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1111 (7th Cir. 1984). Importantly, however, *Benjamin* itself addressed a specific situation in which the scope of the district court's order was unclear. See 833 F.2d at 671-72 (noting that the court used both the words "complaint" and "action"). If the district court clearly intended its order of dismissal to dispose of the entire action, not merely the complaint itself, there exists a final and appealable judgment and the *Benjamin* rule is inapplicable. *Rothner v. City of Chicago*, 929 F.2d 297, 300 (7th Cir. 1991).

Here, the district court's intent was obvious. When the court granted the defendants' motion to dismiss,

a separate entry was immediately made in the court docket on Form AO 450, the form specifically used for entry of a separate final judgment under Rule 58. See *Martinez v. City of Chicago*, 499 F.3d 721, 724 (7th Cir. 2007). In denying Abcarian's Rule 59(e) motion, the court stated that its previous order meant to make "abundantly clear" that the court "dismissed the *action, not the amended complaint.*" *Abcarian*, 2009 WL 2448044, at *2 (emphasis added). A court's interpretation of its own orders can be rejected for an abuse of discretion, *In re Chicago, Rock Island & Pac. R.R. Co.*, 860 F.2d 267, 272 (7th Cir. 1988), but Abcarian draws our attention to nothing in the record that would persuade us not to take the district court at its word. Final judgment was entered in this matter before Abcarian attempted to amend his complaint a second time. Accordingly, the district court did not err when it denied Abcarian leave to file his second amended complaint. *Sparrow*, 116 F.3d at 205.

The judgment of the district court is AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HERAND ABCARIAN

Plaintiff,

No. 08-CV-03843

TIMOTHY MCDONALD, et al.,

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, August 10, 2009:

MINUTE entry before the Honorable Samuel Der-Yeghiayan: For the reasons stated in the Court's memorandum opinion dated 08/10/09, Plaintiff's motions for reconsideration and for leave to file an amended complaint [58] are denied. Defendants are given until 08/17/09 to file their motion for attorneys' fees. Plaintiff is given until 08/31/09 to file his response and Defendants are given until 09/07/09 to file their reply. Defendants' motion to set filing procedure [60] is denied as moot.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HERAND ABCARIAN
Plaintiff,
v. No. 08-CV-03843
TIMOTHY MCDONALD, et al.,
Defendants.

MEMORANDUM OPINION
Dated: August 10, 2009
Samuel Der-Yeghiayan, District Judge

This matter is before the court on Plaintiff Herand Abcarian's (Abcarian) motion for reconsideration and for leave to file an amended complaint. For the reasons stated below, we deny both motions.

BACKGROUND

Abcarian alleged that he was employed as a physician by the University of Illinois at the University of Illinois Medical Center at Chicago. Abcarian allegedly treated John Behzad, who later died. A settlement was allegedly later reached involving a state wrongful death action (State Action) and Abcarian contends that Defendants conspired to reach the settlement without Abcarian's knowledge or consent. Abcarian contends that Defendants also conspired to settle the State Action so that they could damage his reputation by

reporting the settlement to the Division of Professional Regulation of the Illinois Department of Financial and Professional Regulation, and the National Practitioners Data Bank, the organizations responsible for collecting information on malpractice suits and settlements. Abcarian also contends that Defendants retaliated against him for complaining about matters such as rising premiums for professional liability insurance, risk management and safety issues, faculty recruitment, compensation, and fringe benefits.

Abcarian brought the instant action, and included in his amended complaint claims brought pursuant to 42 U.S.C. § 1983 (Section 1983) for alleged violations of his First Amendment rights (Counts I and IV), Section 1983 procedural due process claims (Count II), Section 1983 substantive due process claims (Count III), Section 1983 deprivation of right to trial by jury claims (Count V), Section 1983 equal protection claims (Count VI), claims seeking equitable and other relief for continuing damages (Count VII), breach of fiduciary duty claims (Count VIII), intentional of infliction of emotional distress (IIED) claims (Count IX), abuse of process claims (Count X), and libel claims (Count XI). Defendants moved to dismiss all claims.

On March 9, 2009, we granted Defendants' motion to dismiss the federal claims in this case and dismissed the remaining state claims without prejudice. Since the court had denied all relief available to Abcarian, the Clerk of the Court, pursuant to Federal Rule of Civil Procedure 58(b)(1), promptly entered judgment in this case on March 9, 2009. Abcarian requests, pursuant to Federal Rule of Civil Procedure 59(e)

(Rule 59(e)), that the court reconsider the March 3, 2009 dismissal and requests leave to file a second amended complaint.

LEGAL STANDARD

Rule 59(e) permits parties to file, within ten business days of the entry of a judgment, a motion to alter or amend the judgment. Fed. R. Civ. P. 59(e); Fed. R. Civ. P. 6. Rule 59(e) motions do not give a party the opportunity to rehash old arguments or to present new arguments or evidence "that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996)(citing *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995)). Rather, for a Rule 59(e) motion, the movant "'must clearly establish either a manifest error of law or fact or must present newly discovered evidence'" in order to be successful. *LB Credit Corp.*, 49 F.3d at 1267 (quoting *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986)).

DISCUSSION

We note initially that Abcarian has not challenged the court's dismissal of all claims brought against Defendant Board of Trustees of the University of Illinois based on the Board's Eleventh Amendment protection. Nor has Abcarian challenged the court's dismissal of the Section 1983 deprivation of right to trial by jury claims (Count V).

I. Final Judgment

Abcarian argues in his motion that he filed a Rule 59(e) motion and a motion for leave to file an amended complaint, in part, because he does not believe that the court entered a final judgment on March 9, 2009. Abcarian bases this conclusion on the accompanying minute order stating that Defendants' motion to dismiss "Plaintiff's first amended complaint is granted in its entirety." (DE 55). However, Abcarian incorrectly presumes that the reference to the amended complaint with the dismissal order meant that the court was merely dismissing the complaint and not the action. As the memorandum opinion makes abundantly clear, the court dismissed the action, not the amended complaint. The Clerk of Court also then entered a separate final judgment in the case. (DE 57). Thus, a final judgment was entered in this case on March 9, 2009.

II. First Amendment Claims (Counts I and IV)

Abcarian contends that the court erred in dismissing his First Amendment claims. The court dismissed Abcarian's First Amendment claims since the facts alleged by Abcarian indicated that he was speaking as part of his official duties. There was no indication in his allegations that his speech was not "part of the tasks he was employed to perform. . . ." *Sigsworth v. City of Aurora,* 487 F.3d 506, 511 (7th Cir. 2007). Abcarian did not present facts that plausibly suggest that he was speaking out as a citizen on matters of public concern. *See id.* at 509 (providing elements for a public employee's First Amendment retaliation claim). Abcarian contends that the court misunderstood his claims. He now

asserts that, although he alleged that the statements made were during his course of employment, he did not mean to imply that he was alleging First Amendment claims relating to his employment. However, as Defendants point out, Abcarian has failed to show how his allegations, which involved complaints by him about matters such as faculty compensation and fringe benefits, implied anything other than a First Amendment retaliation claim relating to public employment. Even the heading for his First Amendment claim of "Violations of 42 U.S.C. § 1983: Free Speech on Matters of Public Concern," points to the legal standard for a First Amendment retaliation claim and suggests only that Abcarian is pursuing such a claim. (A. Compl. 30). Abcarian has not shown that the court erred in dismissing his First Amendment claims and has not pointed to any new arguments or evidence that he could not have presented earlier. Abcarian's arguments are merely regurgitations of the arguments he presented earlier.

Abcarian's attempt to avoid the dismissal of the First Amendment claims after the fact by characterizing his allegations in a different light is unpersuasive. For example, Abcarian contends now that "this case does not involve any action taken against Dr. Abcarian by his employer." (Reply 1). Abcarian asserts that he is not intending to bring any claim against his employer, pointing out that "[i]n the proposed Second Amended Complaint, [he] makes no claim against his employer." (Reply 9). However, Defendants' motion to dismiss was premised upon Abcarian's first amended complaint, a complaint in which he did indicate that he was employed by the University of Illinois Medical

Center at Chicago, and in which he named as a Defendant the Board of Trustees of the University of Illinois. (A. Compl. 1, 3). Abcarian's attempts to re-characterize his claims are untimely.

Abcarian also argues that in *Trejo v. Shoben*, 319 F.3d 878 (7th Cir. 2003), the court held "that at the pleading stage, public concern should be presumed." (Recon. 5). In *Trejo*, the Court did caution that generally the determination of whether an individual was speaking out on a matter of public concern cannot be resolved at the pleading stage. 319 F.3d at 885. However, the holding in *Trejo* was premised on a pleading standard taken from *Gustafson v. Jones*, 117 F.3d 1015 (7th Cir. 1997), which relied upon by *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 64 F.3d 1112 (7th Cir. 1995), which relied upon the United State Supreme Court's holding in *Conley v. Gibson*, 355 U.S. 41 (1957). 355 U.S. at 45-46; 319 F.3d at 885; 117 F.3d at 1017; 64 F.3d at 1114. The principle in *Conley*, that a "'motion should not be granted unless it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief'" was recently abrogated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which this court expressly relied upon in ruling on Defendants' motion to dismiss. *Id.* at 1959-60.

Abcarian also complains that the court, in its prior opinion, went "to some length to sort through [Abcarian's] allegation of his Free Speech protected statements to find that he only alleged speech that was part of his job." (Recon. 4). Such an argument, however, shows nothing more than that the court did what it was supposed to do by basing its opinion on a

thorough review of all the allegations in Abcarian's 48-page amended complaint. The court ruled based on the totality of Abcarian's allegations to assess whether he plausibly suggested a valid claim. Abcarian also contends that the court improperly ruled on the "motion to dismiss as though it were a motion for summary judgment" and asserts that the court improperly conducted a "factual analysis." (Recon. 4). Abcarian, however, fails to point to any facts or evidence that the court relied upon outside of the allegations offered by Abcarian himself. It was Abcarian's own allegations that failed to plausibly suggest a right to relief on his First Amendment claim, and a dismissal was appropriate under Federal Rule of Civil Procedure 12(b)(6). Therefore, we deny Abcarian's motion for reconsideration as to the First Amendment claims (Counts I and IV).

III. Procedural Due Process Claims (Count II)

Abcarian argues that the court erred in dismissing his procedural due process claims. He contends that, although the court properly found that he had a protectable interest in a blemish-free license to practice medicine, the "the court erred in finding that Dr. Abcarian had been accorded his Procedural Due Process rights in the matter." (Recon. 5). However, the court never made such a "finding" that Abcarian had received due process. Rather, as explained in the court's prior ruling, Abcarian had failed to provide allegations that would plausibly suggest a valid procedural due process claim. (3/9/09 MO 5, 17-18). Based on Abcarian's own allegations, there was no indication that he had been denied due process. (A. Compl. Par. 105). Abcarian continues to

assert a desire to reenter the State Action to obtain a "right to contest the settlement or the disposition of the" State Action. (Recon. 6). However, Abcarian acknowledges in his amended complaint that he was allowed to enter the State Action and the plaintiff then chose to voluntarily dismiss the case. (A. Compl. Par. 105). Abcarian thus indicates he was accorded due process in the State Action. As we explained in our prior ruling, to the extent that Abcarian still has some disagreement with the University of Illinois Medical Center at Chicago regarding the reporting of the settlement and amending those reports, that was not a part of the proceedings in the State Action and is not a part of the due process issues in this case. Therefore, we deny the motion for reconsideration of the dismissal of the procedural due process claims (Count II).

IV. Substantive Due Process Claims (Count III)

Abcarian argues that the court erred in dismissing his substantive due process claims. Abcarian contends that the court erred in concluding that the state-created danger theory applied in a situation where a publicly employed individual or entity failed to protect an individual from harm from a private actor. As we explained in our prior ruling, the doctrine of state-created danger is not applicable in this case since it is applied in regard to protecting individuals from harm stemming from private actors. *King v. East St. Louis School Dist., 189*, 496 F.3d 812, 818 (7th Cir. 2007). Abcarian contends that there are "several cases that hold that the actor need not be a private citizen for the state-created danger theory to come into force." (Recon. 7). The

only precedent from this Circuit referred to by Abcarian is *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). (Recon. 7). In *White*, the police arrested a man who had young children with him. *Id.* at 382. The police arrested the man, leaving "all three children in an abandoned automobile on the side of the road" and "[u]nder exposure of the cold, the children finally realized that they had no alternative but to leave the car, cross eight lanes of traffic and wander on the freeway at night in search of a telephone." *Id.* As the above description of the situation by the Court in *White* indicates, the Court in assessing the danger to the children, was concerned with their exposure to potential harm by private sources, not the officers involved in the scene or other state actors involved in the arrest. *Id.* at 382-83.

As the Seventh Circuit indicated in *King v. East St. Louis School Dist., 189*, 496 F.3d 812 (7th Cir. 2007), which Abcarian himself cites in his motion for reconsideration, (Recon. 7), the state-created danger theory was an exception to the general rule that the "Due Process Clause of the Fourteenth Amendment generally does not impose upon the state a duty to protect individuals *from harm by private actors*." *Id.* at 817 (emphasis added). In the instant action, as the court indicated in its prior ruling, Abcarian has not alleged facts that would suggest that any of the publicly employed individuals involved in this case failed to protect him from harm that stemmed from private actors. This is further illustrated by Abcarian's motion for reconsideration in which he continues to argue that his substantive due process claim is based on the need to protect the public from "the public servants tha[t] intentionally set out to damage the reputation and medical license of

someone they perceive as some sort of enemy." (Recon. 8). In addition, as indicated in our prior ruling, even if the state-created danger theory was applicable, Abcarian has not alleged facts that would plausibly suggest that he was subjected to the level of danger generally associated with the state-created danger theory. Thus, Abcarian has not shown that the court erred in concluding that the state-created danger theory is not applicable in this case. Therefore, we deny the motion for reconsideration of the dismissal of the substantive due process claims (Count III).

V. Equal Protection Claims (Count VI)

Abcarian argues that the court erred in dismissing the equal protection claims. Abcarian argues that "this case is not about job action taken against him" and this court improperly considered the holding of *Engquist v. Oregon Dept. of Agr.*, 128 S.Ct. 2146 (2008) in the public employment context. Abcarian is merely repeating an argument already presented to the court. As we stated in our prior ruling, Abcarian indicated that he is pursuing a class-of-one equal protection claim. Abcarian's amended complaint includes allegations concerning alleged wrongdoing in the public employment context. The United States Supreme Court has held that although the Equal Protection Clause still applies to public employers, the "class-of-one theory of equal protection has no application in the public employment context...." *Engquist* 128 S.Ct. at 2155-56. Abcarian has not shown that the court erred in concluding that his equal protection claim is barred under *Engquist*.

Abcarian also contends that the court misunderstood his allegations when it looked too much into the fact that he was employed by a public university. Abcarian states that "[i]t is a matter of complete indifference to his [equal protection] claim whether he happens to have been victimized in his capacity as a physician employed by a public university, a physician employed at a private hospital or as a physician employed by any other entity." (Recon. 9). However, such a statement is contrary to case law. If Abcarian was employed by a private entity, it would not be a state actor and he would not be able to pursue a Section 1983 claim on that basis. *Wagner v. Washington County*, 493 F.3d 833, 836 (7th Cir. 2007)(indicating that for a Section 1983 claim, the defendant "insurer [wa]s not an appropriate party to the suit because it is not a state actor, nor did it deprive [the plaintiff] of any constitutional rights while acting under the color of a state statute"). Therefore, we deny the motion for reconsideration of the dismissal of the equal protection claims (Count VI).

VI. Equitable Relief and Other Relief for Continuing Violations (Count VII)

Abcarian also argues in this motion for reconsideration that he should be allowed to seek equitable relief for continuing violations of his rights. However, Abcarian failed to state a valid federal claim and the court has declined to exercise supplemental jurisdiction over the remaining state claims. Since no claims remain in this case, Abcarian's request for equitable relief is improper.

Therefore, based on the above, we deny Abcarian's motion for reconsideration in its entirety.

VII. Motion For Leave to Amend Complaint

Abcarian also moves for leave to file yet another amended complaint.

Abcarian has already been allowed to amend the complaint once in this action and has still failed to state a valid federal claim. Even if the court allowed him to file his proposed second amended complaint, it would be futile and would not cure the deficiencies in his prior pleading with the added conclusory statements such as the express assertions that he was speaking out as a "citizen on matters of public concern..." (SA Compl. Par. 25). Finally, Abcarian is precluded from amending his complaint since the instant action has not been reinstated. *See Sigsworth*, 487 F.3d at 511 (citing *Paganis v. Blonstein*, 3 F.3d 1067, 1073 n.8 (7th Cir. 1993) for the proposition that "unless a final judgment is set aside or vacated, a plaintiff may not amend her complaint"). On March 9, 2009, this court dismissed the instant action, and the Clerk of Court promptly entered judgment pursuant to Federal Rule of Civil Procedure 58(b)(1) since the court had denied Abcarian all relief. The court has not vacated the judgment and thus, Abcarian may not amend his complaint for the second time. Therefore, we deny Abcarian's motion for leave to file a second amended complaint.

CONCLUSION

Based on the foregoing analysis, we deny Abcarian's motion for reconsideration and deny his motion for leave to file a second amended complaint.

Samuel Der-Yeghiayan
United States District Court Judge

Dated: August 10, 2009

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HERAND ABCARIAN
Plaintiff,
v. 08-CV-3843
TIMOTHY MCDONALD, et al.
Defendants.

JUDGMENT IN A CIVIL CASE

□ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that for the reasons stated in the Court's memorandum opinion dated 03/09/09, Defendants' motion to dismiss Plaintiff's first amended complaint [44] is granted in its entirety. We also decline to exercise supplemental jurisdiction over the remaining state claims and we dismiss the remaining state claims without prejudice.

Date: 3/9/2009 Michael W. Dobbins, Clerk of Court

/s/ Michael A. Wing, Deputy Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HERAND ABCARIAN
Plaintiff,

v. 08-CV-3843

TIMOTHY MCDONALD, et al.
Defendants.

DOCKET ENTRY TEXT

Date 3/9/09 - Judge Samuel Der-Yeghiayan

For the reasons stated in the Court's memorandum opinion dated 03/09/09, Defendants' motion to Dismiss Plaintiff's first amended complaint [44] is granted in its entirety. We also decline to exercise supplemental jurisdiction over the remaining state claims and we dismiss the remaining state claims without prejudice. All pending dates and motions are hereby stricken as moot. Civil case terminated.

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HERAND ABCARIAN
Plaintiff,

v. 08-CV-3843

TIMOTHY MCDONALD, et al.
Defendants.

MEMORANDUM OPINION

Dated: March 9, 2009
Samuel Der-Yeghiayan, District Judge

This matter is before the court on Defendants' motion to dismiss. For the reasons stated below, we grant Defendants' motion to dismiss and dismiss the remaining state claims without prejudice.

BACKGROUND

Plaintiff Herand Abcarian, M.D. ("Abcarian") alleges that he was employed as a physician by the University of Illinois at the University of Illinois Medical Center at Chicago ("UIMCC") in Chicago. Abcarian allegedly treated John Behzad, who later died. David Behzad ("Behzad"), the son of John Behzad, allegedly retained Kathleen T. Zellner ("Zellner") as counsel and allegedly contemplated bringing a wrongful death action in Illinois state

court against Abcarian for the death of Behzad's father. In July 2005, Abcarian allegedly received a letter form Zellner indicating that Behzad was contemplating a wrongful death suit ("Behzad Claim"). Abcarian contends that he forwarded the letter to Defendant William Chamberlin, Jr., M.D. ("Chamberlin"), Chief Medical Officer at UIMCC, who then forwarded the letter to, Defendant Nikki Centomani ("Centomani"), Director of Safety and Risk Management at UIMCC. Abcarian contends that Defendants then conspired to settle the Behzad Claim without the consent of Abcarian. Defendants allegedly conspired against Abcarian because he had previously spoken out against Patricia Kale ("Kale"), Timothy McDonald, M.D., J.D. ("McDonald"), and Chamberlin in regard to rising premiums for professional liability insurance, risk management and safety issues, faculty recruitment, compensation, and fringe benefits. Abcarian contends that Defendants also conspired to settle the Behzad Claim so that they could damage his reputation by reporting the settlement to the Illinois Department of Financial and Professional Regulation, Division of Professional Regulation ("IDFPR") and the National Practitioners Data Bank ("NPDB"), the organizations responsible for collecting information on malpractice suits and settlements.

Defendant Board of Trustees of the University of Illinois ("Board") allegedly agreed to settle the Behzad Claim for $950,000 and on June 13, 2006, a Release and Indemnity Agreement ("Settlement Agreement") was allegedly executed without Abcarian's knowledge. Abcarian alleges that he never consented to the settlement and therefore was

not a party to the settlement. On the same day the Settlement Agreement was signed, Abcarian claims that either Defendant Stuart Allen ("Allen"), or Defendant Barbara McColgin ("McColgin") directed Zellner to file a wrongful death suit against Abcarian as a condition of approval of the settlement, and directed Zellner not to serve Abcarian with notice of the action or settlement.

Behzad allegedly then brought a wrongful death action in Illinois state court ("State Action") against Abcarian and on July 6, 2006, the state court allegedly issued an order approving the settlement and dismissing the case with prejudice. Abcarian alleges the State Action was urged by the Defendants to preclude his right to be heard on the merits of the case and to obtain an adverse judgment against him that could be reported to the IDFPR and the NPDB. Abcarian also alleges Christine Flaningam ("Flaningam") subsequently reported the Behzad Claim to the NPDB and IDFPR in order to discredit Abcarian. Abcarian contends that after receiving letters from NPDB and IDFPR, he retained counsel and discovered the State Action.

Abcarian contends that he filed a petition in the State Action to vacate the orders dismissing the case and approving the settlement, and the state court vacated the dismissal of the State Action. However, Zellner allegedly immediately moved to voluntarily dismiss the case and the state court granted the motion, dismissing the case again. Abcarian also contends that he has asked Defendants to report to NPDB and IDFPR that there was no settlement made against him and that the Behzad Claim was

dismissed with prejudice, but Defendants refused to do so.

Abcarian brought the instant action, and includes in his amended complaint claims brought pursuant to 42 U.S.C. § 1983 ("Section 1983") for alleged violations of his First Amendment rights (Counts I and IV), Section 1983 due process claims (Count II), Section 1983 substantive due process claims (Count III), Section 1983 deprivation of right to trial by jury claims (Count V), Section 1983 equal protection claims (Count VI), claims seeking equitable and other relief for continuing damages (Count VII), breach of fiduciary duty claims (Count VIII), intentional of infliction of emotional distress ("IIED") claims (Count IX), abuse of process claims (Count X), and libel claims (Count XI). Defendants move to dismiss all claims.

LEGAL STANDARD

In ruling on a motion to dismiss brought pursuant to Rule 12(b)(6), the court must draw all reasonable inferences that favor the plaintiff, construe the allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint. *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002); *Perkins v. Silverstein*, 939 F.2d 463, 466 (7th Cir. 1991). In order to withstand a motion to dismiss, a complaint must allege the "operative facts" upon which each claim is based. *Kyle v. Morton High Sch.*, 144 F.3d 448, 454-55 (7th Cir. 1998); *Lucien v. Preiner*, 967 F.2d 1166, 1168 (7th Cir. 1992). A plaintiff is required to include allegations in the complaint that "plausibly suggest

that the plaintiff has a right to relief, raising that possibility above a 'speculative level'" and "if they do not, the plaintiff pleads itself out of court." *E.E.O.C. v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007)(quoting in part *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)). Under the current notice pleading standard in federal courts, a plaintiff need not "plead facts that, if true, establish each element of a 'cause of action. . . .'" *See Sanjuan v. Amer. Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994)(stating that "[a]t this stage the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint" and that "[m]atching facts against legal elements comes later"). The plaintiff need not allege all of the facts involved in the claim and can plead conclusions. *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002); *Kyle*, 144 F.3d at 455. However, any conclusions pled must "'provide the defendant with at least minimal notice of the claim,'" *Kyle*, 144 F.3d at 455 (quoting *Jackson v. Marion County*, 66 F.3d 151, 153-54 (7th Cir. 1995)), and the plaintiff cannot satisfy federal pleading requirements merely "by attaching bare legal conclusions to narrated facts which fail to outline the bases of [his] claims." *Perkins*, 939 F.2d at 466-67. The Seventh Circuit has explained that "[o]ne pleads a 'claim for relief' by briefly describing the events." *Sanjuan*, 40 F.3d at 251; *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998)(stating that "[p]laintiffs need not plead facts or legal theories; it is enough to set out a claim for relief").

DISCUSSION

I. Claims Brought Against the Board

Defendants argue that the claims brought against the Board are barred by the Eleventh Amendment.

A. Board's Eleventh Amendment Protection

Defendants contend that the Board, as an arm of the state, is protected by the Eleventh Amendment from suit. Under the Eleventh Amendment, "states, as sovereigns in our federal system, will not be held amenable to suit in federal court without their consent." *Protestant Memorial Medical Center, Inc. v. Maram*, 471 F.3d 724, 728 n.3 (7th Cir. 2006). The Eleventh Amendment bar has also been held to extend to "an entity in addition to the state itself, when the defendant is an 'arm' or 'alter ego' of the state." *Thiel v. State Bar of Wis.*, 94 F.3d 399, 400-01 (7th Cir. 1996)(quoting in part *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)). The Board is deemed to be an arm of the state of Illinois for purposes of the Eleventh Amendment. *Goshtasby v. Bd. of Trs. of Univ. of Ill.*, 123 F.3d 427, 427 (7th Cir. 1997); *see also Joseph v. Board of Regents of University of Wisconsin System*, 432 F.3d 746, 748 (7th Cir. 2005)(stating that the defendant board of regents "is an arm of the state for Eleventh Amendment purposes")(internal quotations omitted). Thus, the Board is entitled to Eleventh Amendment protection and cannot be sued in federal court.

B. Exceptions to Eleventh Amendment

Abcarian argues that the Board can be sued in federal court in accordance with the exceptions to the Eleventh Amendment immunity. There are three exceptions to a state's Eleventh Amendment immunity: (1) "a state may waive immunity by

consenting to suit in federal court," (2) "Congress may abrogate the state's immunity through a valid exercise of its powers," or (3) "under the *Ex parte Young* doctrine, a plaintiff may file 'suit[ ] against state officials seeking prospective equitable relief for ongoing violations of federal law . . . .'" *Peirick v. Indiana University-Purdue University Indianapolis Athletics Dept.*, 510 F.3d 681, 695 (7th Cir. 2007)(quoting in part *Marie O. v. Edgar*, 131 F.3d 610, 615 (7th Cir. 1997)).

The second exception to Eleventh Amendment immunity is not applicable in the instant action since Congress has not abrogated the states' immunity for claims under Section 1983. *See Joseph*, 432 F.3d at 748 (indicating that "[t]he Supreme Court has expressly held that Congress has not abrogated the states' immunity in § 1983 suits"); *Kroll v. Board of Trustees of University of Illinois*, 934 F.2d 904, 909 (7th Cir. 1991)(stating that "[t]he Supreme Court, however, long ago dispelled the notion that section 1983 abrogated the states' eleventh amendment immunity, and suits filed under that statute must still pay heed to the eleventh amendment").

The third exception to Eleventh Amendment immunity is not applicable in the instant action since the *Ex Parte Young* doctrine permits suits against state officials for prospective relief, not states or their agencies, such as the Board. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)(stating that the *Ex parte Young* "exception is narrow" and "has no application in suits against the States and their agencies, which are barred regardless of the relief

sought"); *Peirick*, 510 F.3d at 695; *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 337 (7th Cir. 2000)(stating that the "*Ex parte Young* doctrine allows private parties to sue individual state officials for prospective relief to enjoin ongoing violations of federal law").

Abcarian argues that the first exception to Eleventh Amendment immunity is applicable in the instant action since the Board has waived its Eleventh Amendment immunity. A court should "'indulge every reasonable presumption against' a state's waiver of its immunity...." *MCI Telecommunications Corp.*, 222 F.3d at 338 (quoting in part *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999))(stating that "the test 'for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one'"). A state is deemed to have waived its Eleventh Amendment immunity "when 'the State voluntarily invokes' federal jurisdiction or when 'the State makes a clear declaration' that it intends to submit itself to federal jurisdiction.'" *Id.* (quoting in part *College Savings Bank*, 527 U.S. at 675-76)(stating that "[i]n either case, there must be an 'unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment'").

Abcarian contends that the Board waived its immunity due to the fact that its regulations provide that the University of Illinois ("University") will not engage in discrimination and "will comply with all federal and state nondiscrimination, equal opportunity and affirmative action laws, orders and regulations." (A. Compl. Par. 20). However, the

mere assertion that the University will not violate federal laws does not mean that the University is consenting to suit in federal court.

Abcarian also contends that a representative of the Board, spoke at one of the hearings in the State Action and the representative acknowledged its obligations under state and federal law and stated that if Abcarian "has a dispute with his employer over the manner in which they settled the claim or the manner in which they reported it, he has avenues and he has forums available to him to challenge us and to sue us or to bring a claim against" the Board. (A. Compl. Par. 107). Abcarian contends that the representative's reference to "avenues" and "forums" meant litigation in State Court. However, vague references to "avenues" and "forums" are far from the clear and unequivocal waiver that must be provided by a state. *MCI Telecommunications Corp.*, 222 F.3d at 338. Defendants also contend that the reference by the Board representative to avenues and forums for Abcarian's claims, which include state tort claims such as Illinois IIED claims, was a reference to the Illinois Court of Claims, which has exclusive jurisdiction to hear "[a]ll claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit. . . ." 705 ILCS 505/8(d). Thus, based on the above, Abcarian has not shown that any of the exceptions to the Board's Eleventh Amendment immunity are applicable in this case.

C. Judicial Estoppel Barring Eleventh Amendment Protection

Abcarian also argues that the Board is judicially estopped from asserting its Eleventh Amendment sovereign immunity. Under the doctrine of judicial estoppel, if a "'party *prevails* on one legal or factual ground in a lawsuit, that party cannot later repudiate that ground in subsequent litigation based on the underlying facts.'" *Pakovich v. Broadspire Services, Inc.*, 535 F.3d 601, 606 (7th Cir. 2008)(quoting *Urbania v. Cent. States, Se. & Sw. Areas Pension Fund*, 421 F.3d 580, 589 (7th Cir. 2005))(emphasis in original). Abcarian argues that in the State Action, after he joined the action, he "asserted that the Board was barred by the doctrine of sovereign immunity from intervening in the Petition which . . . Abcarian brought to vacate the dismissal and settlement order." (Ans. 5). Abcarian argues that the Board asserted in the State Action that it was not barred by sovereign immunity from intervening in the State Action. Abcarian thus contends that the Board is barred from maintaining an inconsistent position in the instant action. However, Defendants correctly point out that the issue in the State Action was whether the doctrine of sovereign immunity barred the Board from intervening in a state court proceedings. Such an issue is entirely distinct from the issue of whether a suit against the Board in federal court is precluded by the Eleventh Amendment. The State Action proceedings involve separate issues and, in fact, the Seventh Circuit has specifically acknowledged that "[a] state may waive its immunity to suit in its own courts without authorizing suit in federal court." *NBD Bank, N.A. v. Bennett*, 67 F.3d 629, 634 (7th Cir. 1995)(citing *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306 (1990)). Thus, the Board is not barred under the doctrine of judicial estoppel

from asserting its Eleventh Amendment immunity. Therefore, based on the above, we grant Defendants' motion to dismiss the claims brought against the Board.

II. First Amendment Retaliation Claims (Count I)

Defendants argue that the First Amendment retaliation claims should be dismissed since the allegations in the amended complaint show that Abcarian did not speak out as a citizen concerned about matters of public concern. For a First Amendment retaliation claim, a plaintiff must establish: "'(1) his speech was constitutionally protected, (2) he has suffered a deprivation likely to deter free speech, and (3) his speech was at least a motivating factor in the employer's action.'" *Nagle v. Village of Calumet Park*, 2009 WL 249974, at *12 (7th Cir. 2009)(quoting *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006)). A public employee's speech is constitutionally protected if "(1) the employee spoke as a citizen on matters of public concern, and (2) the interest of the employee as a citizen in commenting upon matters of public concern outweighs the interest of the State as an employer in promoting the efficiency of the public services it performs through its employees." *Sigsworth v. City of Aurora*, 487 F.3d 506, 509 (7th Cir. 2007).

In the instant action, Abcarian alleges that he was a public employee at the time in question. (A. Compl. Par. 3). Abcarian alleges that during his employment, he held certain supervisory and administrative positions, including serving as the President of the Executive Committee of the Medical staff at the UIMCC, the Service Chief of the

Department of Surgery at the UIMCC, and the Head of the Department of Surgery. (A. Compl. Par. 3). Defendants contend that, to the extent that Abcarian alleges that he spoke out on issues, such speech was within his official duties.

Abcarian contends that he spoke out on matters concerning: (1) physician discipline, (2) premiums for professional liability coverage for members of the medical staff, (3) faculty compensation and fringe benefits, (4) managerial decisions concerning the allocation of costs to administrative expenses, and (5) faculty recruitment. (A. Compl. Par. 25, 26, 121). Abcarian contends that he was speaking out on matters of public concern and such speech is protected by the First Amendment. However, all of the above statements fall within the scope of Abcarian's concerns as a physician and his supervisory and executive positions. Abcarian has not presented facts that show that such speech was anything other than the speech that "was part of the tasks he was employed to perform" and thus since "he spoke not as a citizen but as a public employee, ... that speech is not entitled to protection by the First Amendment." *Sigsworth*, 487 F.3d at 511.

Abcarian also alleges he has had confrontations with Chamberlin over faculty recruitment, compensation, and fringe benefits. These claims are clearly within the scope and duties of a physician, such as Abcarian, with official titles of President of the Executive Committee of the Medical staff at the UIMCC, Service Chief of the Department of Surgery at the UIMCC, and Head of the Department of Surgery, and the Chief Medical Officer at UIMCC, such as Chamberlin, as they pertain to human

resource issues. In addition, Abcarian contends that Chamberlin "gives his attention to administrative matters" and is "responsible for ultimate resolution of all complaints brought against members of the medical staff." (A. Compl. Par. 7). Thus, is it apparent from the facts alleged by Abcarian that when he was discussing matters with Chamberlin, Abcarian was speaking as part of his official duties.

Abcarian also asserts that he spoke out regarding "Risk Management and patients' Safety issues." (A Compl. Par. 121). Such a statement on its surface suggests that Abcarian was concerned about patient safety, which could be a matter of public concern to private citizens. However, when viewing the statement in the context of the other facts included in the amended complaint, it is apparent that such speech was made by Abcarian in his professional capacity. Abcarian contends that there was "personal animosity" between himself and McDonald. (A Compl. Par. 24). Abcarian contends that he was involved with the Operating Room Committee, a committee of the medical staff to UIMCC responsible for the conduct of the operating room. (A. Compl. Par. 24).

Abcarian contends that he had disagreements with McDonald about the conduct in the operating room and Abcarian was "instrumental in seeking to have [McDonald] removed from the Operating Room Committee...." (A. Compl. Par. 24). It is in this context that Abcarian allegedly spoke out about "Risk Management and Safety issues." (A. Compl. Par. 25). Abcarian alleges that the speech was tied to his dispute with McDonald and the Operating Room Committee and included issues such as whether

"operating room privileges should be suspended for physicians who are impaired by their abuse of prescription drugs." (A. Compl. Par. 25). Thus, the speech concerning the Risk Management and Safety issues, was tied to Abcarian's dispute with McDonald over decisions concerning operating room management, which was controlled by the staff committee for which Abcarian was acting. Thus, in regard to the "Risk Management and Safety" speech, Abcarian has not shown other than that his speech "was part of the tasks he was employed to perform...." *Sigsworth*, 487 F.3d at 511. Abcarian's own allegations indicate that, in speaking, "he was merely doing what was expected of him" in his professional roles. *Id.* Also, to the extent that Abcarian in making any speech was acting beyond his "'core' job functions," such speech would not be protected if he was speaking "'pursuant to official responsibilities.'" *Spiegla v. Hull*, 481 F.3d 961, 966 (7th Cir. 2007)(quoting in part *Garcetti v. Ceballos*, 547 U.S. 410, 433 (2006)). Thus, based on the above, Abcarian has not presented facts that plausibly suggest that he was speaking out as a citizen on matters of public concern and we grant Defendants' motion to dismiss the First Amendment retaliation claims (Count I).

II. Procedural Due Process Claims (Counts II and IV)

Defendants move to dismiss the procedural due process claims. For a Section 1983 procedural due process claim, a plaintiff "must show that [the plaintiff was] deprived of a constitutionally protected interest in life, liberty or property," and "[i]f the plaintiff[] can establish such a loss, [the court] then

must determine what process was due regarding that loss." *Belcher v. Norton*, 497 F.3d 742, 750 (7th Cir. 2007). Abcarian contends that he was deprived of notice and an opportunity to be heard in the State Action, and that he was deprived of his liberty interest in his good name and reputation and his property interest in his unrestricted and unquestioned status regarding his license to practice medicine. (A. Compl. Par. 32, 35, 130, 139).

A. Protectable Interest

Defendants argue that Abcarian does not have a protected interest in his reputation. An individual "does not have a protectable liberty or property interest in h[is] reputation...." *Hojnacki v. Klein-Acosta*, 285 F.3d 544, 548 (7th Cir. 2002). However, a protectable interest has been recognized in "'the liberty to follow a trade, profession, or other calling.'" *Draghi v. County of Cook*, 184 F.3d 689, 693 (7th Cir. 1999)(quoting *Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (7th Cir. 1992)). In addition, the Seventh Circuit has recognized a protectable "interest in a blemish-free license to practice medicine. . . ." *Fleury v. Clayton*, 847 F.2d 1229, 1232 (7th Cir. 1988). Abcarian claims in his amended complaint that the report of the settlement in the State Action would be a blemish on his license to practice medicine and would "call[] his license to practice medicine into question." (A. Compl. Par. 135, 139). For the purposes of the instant motion we must accept such allegations as true. Therefore, we conclude that Abcarian has alleged a protectable interest.

B. Denial of Due Process

Defendants also argue that even if Abcarian has shown a protectable interest, he was not denied any due process. We agree. Abcarian contends that he was not informed about the settlement and the State Action and was not accorded due process before they were concluded. However, Abcarian acknowledges that the court in the State Action vacated the first dismissal and reinstated the case and Abcarian's counsel was able to participate in the case. (A. Compl. Par. 105). Behzad, as the plaintiff, exercised his right to voluntarily dismiss the case, which he did. (A. Compl. Par. 105). Abcarian appears to be dissatisfied with the outcome in the case, but he had his day in court. Thus, Abcarian was accorded due process in the State Action. To the extent that he still has issues with UIMCC regarding the reporting of the settlement and amending those reports, that was not a part of the proceedings in the State Action and is not a part of the due process issues in this case. Therefore, we grant Defendants' motion to dismiss the procedural due process claims (Count II and IV).

III. Substantive Due Process Claims (Count III)

Defendants move to dismiss the substantive due process claims. Abcarian alleges that Defendants engaged in retaliatory acts that deprived him of his fundamental substantive due process rights to "bodily integrity." (A. Compl. Par. 134). Abcarian alleges that he has a right to be free from intentional infliction of acute emotional distress caused by the false reporting of the settlement of the medical negligence case to state regulators. (A. Compl. Par. 134). Abcarian further alleges that the false accusations of medical malpractice were a "state-

created danger" that imposed a duty on the state to protect Abcarian from harm. (A. Compl. Par. 135). Abcarian contends that this state-created danger had the effect of making him vulnerable to acute emotional distress, damaged his professional reputation causing him economic damages, and called his license to practice medicine into question.

(A. Compl. Par. 135). As Defendants point out, no court has recognized a bodily integrity Section 1983 substantive due process claim based on emotional distress alone. Abcarian has also failed to cite any such precedent to support such a conclusion. *See, e.g., Brainerd v. Potratz*, 421 F. Supp. 836, 840 (N.D. Ill. 1976)(indicating that the tort of intentional infliction of emotional distress is not a recognized basis to support a 1983 claim). We agree with Defendants that claims based on the deprivation of the right to bodily integrity are limited and involve allegations of outrageous physical conduct.

Abcarian also contends that the false accusations contained in the medical malpractice settlement were a state-created danger that imposed a duty on the state to protect Abcarian from harm. (A. Compl. Par. 135). The due process protection of individuals "generally does not impose upon the state a duty to protect individuals from harm by private actors." *King v. East St. Louis School Dist., 189*, 496 F.3d 812, 818 (7th Cir. 2007). The state-created danger doctrine is an exception to that general rule. *Id.* Under the state-created danger doctrine the "Due Process Clause imposes upon the state a duty to protect individuals against dangers the state itself creates . . . ." *Id.*

Abcarian alleges that state actors created danger to his emotional state when they made false reports that a medical malpractice case had been settled against him. This state-created danger allegedly had the effect of making him vulnerable to acute emotional distress, damaged his professional reputation causing him economic damages and called his license to practice medicine into question. (A. Compl. Par. 135). However, Abcarian does not allege that the danger and harm were caused by a private actor. Thus, the doctrine of state-created danger is not applicable in this case. *See King*, 496 F.3d at 818 (stating that the state-created danger exception was an exception to the general rule that the "Due Process Clause of the Fourteenth Amendment generally does not impose upon the state a duty to protect individuals *from harm by private actors*")(emphasis added); *Witkowski v. Milwaukee County*, 480 F.3d 511, 513 (7th Cir. 2007)(referring to the "privately created danger"). In addition, even if the doctrine was applicable, Abcarian was not subjected to the level of danger generally associated with the state-created danger exception. *See e.g. King*, 496 F.3d at 818 (stating that "because the right to protection against state-created dangers is derived from the substantive component of the Due Process Clause, the state's failure to protect the individual must shock the conscience"); *Monfiles*, 165 F.3d at 518 (involving heightened danger that resulted in a death); *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993)(involving a danger that resulted in a drunk driver causing an accident). Therefore, we grant Defendants' motion to dismiss the substantive due process claims (Count III).

IV. Right to Jury Trial Claims (Count V)

Defendants move to dismiss the right to a jury trial claims. Abcarian asserts that he had a right to a trial by jury pursuant to the Seventh Amendment which was violated when Defendants concealed the existence of the medical malpractice action in state court and settled the claim without his knowledge. (A. Compl. Par. 143). First, Abcarian concedes in his own facts that, after he was allowed to enter the State Action with his counsel, the plaintiff in the case voluntarily dismissed the action. (A. Compl. Par. 105). Abcarian has not presented any authority providing a defendant with a right to a jury trial in a case when the plaintiff no longer wishes to pursue the case. Also, as Defendants point out, "[t]he Seventh Amendment . . . does not apply in state courts." *Wartman v. Branch 7, Civil Division, County Court, Milwaukee County, State of Wis.*, 510 F.2d 130, 134 (7th Cir. 1975). Abcarian also concedes in his response to the instant motion that "there seems to be no case which holds that the Seventh Amendment right to a trial by jury is binding upon the states by virtue of the Fourteenth Amendment . . . ." (Ans. 13). Abcarian has not presented facts that could support his denial of a right to jury trial and therefore, we grant Defendants' motion to dismiss claims relating to the right to a jury trial (Count V).

VI. Equal Protection Claims (Count VI)

Defendants move to dismiss the equal protection claims. Abcarian clarifies in his response to the instant motion that he intends to pursue class-of-one equal protection claims. (Ans. 14). However, the United States Supreme Court has recently held that

although the Equal Protection Clause still applies to public employers, the "class-of-one theory of equal protection has no application in the public employment context. . . ." *Engquist v. Oregon Dept. of Agr.*, 128 S.Ct. 2146, 2155-56 (2008). Abcarian alleges in his amended complaint facts that indicate his claim occurred in a public employment context. Therefore, we grant Defendants' motion to dismiss the equal protection claims (Count VI). In, addition, since we have granted Defendants' motion to dismiss as to all federal Section 1983 claims, we grant Defendants' motion to dismiss the claims for equitable relief that are based on the federal Section 1983 claims in Count VII.

VII. Remaining State Claims

Having resolved the federal claims in this case, we must determine whether to continue to exercise supplemental jurisdiction over the remaining state claims. Once the federal claims in an action no longer remain, a federal court has discretion to decline to exercise supplemental jurisdiction over any remaining state law claims. *See Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1252 (7th Cir. 1994)(stating that "the general rule is that, when all federal-law claims are dismissed before trial," the pendent claims should be left to the state courts). The Seventh Circuit has stated that there is no "'presumption' in favor of relinquishing supplemental jurisdiction" and that a court may retain jurisdiction where a statute of limitations would bar future suits, where "substantial federal judicial resources have already been expended on the resolution of the supplemental claims," and "where it is obvious how the claims should be decided."

Williams Electronics Games, Inc. v. Garrity, 479 F.3d 904, 90607 (7th Cir. 2007). The Seventh Circuit has stated that, In exercising that discretion, the court should consider a number of factors, including "the nature of the state law claims at issue, their ease of resolution, and the actual, and avoidable, expenditure of judicial resources. . . ." *Timm v. Mead Corp.*, 32 F.3d 273, 277 (7th Cir. 1994). We have considered all of the pertinent factors and, as a matter of discretion, we decline to exercise supplemental jurisdiction over the remaining state law claims. Therefore, we dismiss all remaining state claims without prejudice.

CONCLUSION

Based on the foregoing analysis, we grant Defendants' motion to dismiss in its entirety. We also decline to exercise supplemental jurisdiction over the remaining state claims and we dismiss the remaining state claims without prejudice.

Samuel Der-Yeghiayan
United States District Court Judge

Dated: March 9, 2009

APPENDIX I

APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FIRST DIVISION

May 19, 2008

No. 1-07-1357

DAVID BEHZAD, as Special Administrator of the Estate of JOHN BEHZAD, deceased,
Plaintiff-Appellee,
v.
HERAND ABCARIAN, M.D.,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County
No. 06 L 6172 – Donald J. Suriano, Judge Presiding

ORDER

In the underlying lawsuit, plaintiff David Behzad filed a wrongful death action against defendant Herand Abcarian, M.D. Defendant was employed by the University of Illinois (University) at the University of Illinois Hospital in Chicago when he treated Behzad's father, John Behzad. The suit was settled by the Board of Trustees of the University (Board).

Defendant appeals the trial court's order denying his petition to vacate the order approving the settlement. He also appeals the court's order denying

his petition for Rule 137 sanctions against the Board. We affirm.

FACTS

On July 8, 2005, plaintiff's counsel sent defendant a letter informing him of a potential wrongful death lawsuit against him. The letter said that if counsel did not hear from defendant's insurance company within 14 days, she would file suit against the defendant in Cook County. The record shows that on July 17, 2005, defendant sent an email to William Chamberlin asking him where to send the letter. The copy of the letter in the record is stamped "Received" on July 13, 2005, by "University Counsel Claims Management, Chicago Campus."

As a University employee, defendant qualified as a "Covered Person" under the University's Liability Self-Insurance Plan. Under the policy, the University:

> "shall have the right and duty to defend any suit seeking such damages against the Covered Person, even if any or all of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and such settlement of any claim or suit as it deems expedient***."

The policy also provides:

> "If the Covered Person shall refuse to consent to any settlement recommended by the Vice President and shall elect to contest the

> claim or continue any legal proceedings in connection with such claim, then the Plan's liability for the claim shall not exceed the lesser of the limit of Article IX or the amount for which the claim could have been settled including costs, charges and expenses incurred up to date of such refusal."

On June 13, 2006, plaintiff filed a wrongful death action against the defendant in the Circuit Court of Cook County. Defendant was not served with process. Neither the defendant nor the Board filed an appearance in the case. The University was not named as a defendant.

The Board settled the claim for $950,000. Plaintiff signed a Release and Indemnity Agreement releasing the Board, its employees, agents, students, and servants from any and all claims and causes of action arising from injuries sustained on or about June 7, 2003, through February 4, 2005. Defendant was not named in the release. Plaintiff filed a petition in the trial court for approval of the settlement. On July 6, 2006, the trial court entered an order approving the settlement, directing the Special Administrator to distribute the proceeds, and dismissing the cause with prejudice.

Defendant filed a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)), seeking to vacate the July 6, 2006, order and to direct the estate to return the settlement funds. He alleged the Board had no authority to settle the lawsuit. He said he was unaware of the existence of the lawsuit while it was pending in the court. The Board filed a petition to

intervene and a petition to strike defendant's section 2-1401 petition. Defendant filed a motion to dismiss the Board's petition to intervene.

On April 18, 2007, the trial court granted defendant's section 2-1401 petition to the extent it sought to vacate the dismissal order of July 6, 2006. It denied defendant's requestto vacate the court's approval of the settlement. The plaintiff then voluntarily dismissed the reinstated action with prejudice. The trial court never ruled on the Board's petition to intervene.

On May 7, 2007, defendant filed a petition for an award of fees as a sanction pursuant to Supreme Court Rule 137 (155 Ill. 2d R. 137). The petition was directed at the Board and its counsel for filing the motion to intervene in the section 2-1401 proceeding. The court denied the motion for sanctions on May 17, 2007. Defendant appeals the April 18, 2007, and May 7, 2007, orders.

DECISION

I. Order Approving Settlement

Defendant contends the court erred in refusing to vacate the July 6, 2006, order approving the settlement between the Board and the plaintiff. He says the order is void ab initio for lack of personal jurisdiction because he was never served in the lawsuit. Service of summons on a defendant is necessary to create personal jurisdiction of the court. In the absence of proper service, any judgment entered against a defendant is void ab initio. State

Bank of Lake Zurich v. Thill, 135 Ill. App. 3d 747, 754 (1985).

The Board admits defendant was not served. It contends the lack of service is irrelevant, however, because the order was entered pursuant to a settlement, not an adjudication on the merits. The defendant was not a party to the settlement. According to the Board, the court's approval of the settlement had no effect on defendant's rights. We agree with the Board. The order approving the settlement was not a judgment against the defendant requiring personal jurisdiction over him. Service on the defendant was not necessary for the court to approve a settlement between the plaintiff and the Board.

Given that defendant was not a party to the settlement agreement, and the lawsuit against him was dismissed, he cannot now argue that the trial court lacked the authority to appoint a Special Administrator for purposes of filing suit. Nor were defendant's constitutional rights violated by the court's order approving settlement. The existence of defendant's meritorious defense against the underlying lawsuit is irrelevant.

Defendant's claim that the Board lacked the authority to settle the case without his consent was not a proper issue in the trial court and is not an issue in this appeal.

We also note defendant's statement of facts is argumentative, contains irrelevant and inappropriate facts, and does not convey a complete picture of the facts, in violation of Supreme Court

Rule 341(h)(6) (210 Ill. 2d R. 341 (h)(6)) (appellant's statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately fairly without argument or comment"). Defendant does not acknowledge his receipt of the letter from plaintiff's counsel informing him of the upcoming wrongful death lawsuit or his transmittal of that letter to the University.

II. Petition for Fees Pursuant to Rule 137

Defendant contends the trial court erred in denying his petition for fees as a sanction against the Board for filing its petition to intervene. Supreme Court Rule 137 requires an attorney to certify he has read the pleading or motion, and, to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and warranted by existing law. 155 Ill. 2d R. 137. The purpose of the rule is to restrict litigants who plead false or frivolous matters with no basis in the law. Fremarek v. John Hancock Mutual Life Insurance Co., 272 Ill. App. 3d 1067, 1074 (1995). The trial court has discretion whether to grant or deny sanctions under Rule 137, and we will not disturb the decision absent an abuse of discretion. Fremarek, 272 Ill. App. 3d at 1074.

Defendant says the Board's petition had no basis in law because the court lacked subject matter jurisdiction. He relies on sovereign immunity statutes providing that the State is immune from suit in any court (745 ILLS 5/1 (West 2006) (State Lawsuit Immunity Act)), and the Court of Claims has exclusive jurisdiction over cases against the Board (705 ILCS 505/8 (d) (West 2004) (Court of

Claims Act)). He also contends the Board is collaterally estopped and judicially estopped from intervening based on prior court decisions dismissing the Board as a defendant.

The Board sought leave to intervene in the section 2-1401 proceeding pursuant to sections 2-408(a)(2) and 2-408(b)(2) of the Code of Civil Procedure. Section 2-408 (a) (2) provides anyone shall be permitted to intervene as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 ILCS 5/2-408(a)(2) (West 2006). Section 2-408(b)(2) allows anyone in the discretion of the court to intervene where "an applicant's claim or defense and the main action have a question of law or fact in common." 735 ILCS 5/2-408(b)(2) (West 2006).

Defendant confuses the underlying lawsuit with the section 2-1401 proceeding, in which the Board sought to intervene. A section 2-1401 petition, though filed in the same proceeding, commences a new cause of action. It is not a continuation of the proceeding in which the original judgment was entered. Brownincg, Ektelon Division v. Williams, 348 Ill. App. 3d 830, 833 (2004). The section 2-1401 proceeding was not an action against the State governed by the sovereign immunity statutes. See People v. Wilcoxen, 358 Ill. App. 3d 1076, 1078 (2005) (sovereign immunity applies only where a party makes the State a party, not when the State chooses to become a party by initiating proceedings). Collateral and judicial estoppel do not apply because the cases cited by the defendant involved the State being dismissed as a defendant.

The Board had a right to protect its interests in the section 2-1401 proceeding. The defendant's petition was directed at the settlement between the plaintiff and the Board. It was the Board's money at stake in the settlement. At the least, the Board's motion to intervene was grounded in fact and law and was not frivolous. We hold the trial court properly refused to award fees to the defendant as a sanction against the Board.

We see no need to address defendant's remaining argument that this court should award sanctions pursuant to Supreme Court Rule 366(a) (5).

We affirm the trial court's orders.

Affirmed.

Wolfson, J., with Garcia, and R. Gordon, JJ., concurring.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HERAND ABCARIAN, M.D., F.A.C.S.	)	
	)	
Plaintiff,	)	
	)	
v.	)	08CV3843
	)	
TIMOTHY MCDONALD, M.D., J.D.,	)	
PATRICIA KALE, WILLIAM H.	)	
CHAMBERLIN, JR., M.D.,	)	
NIKKI CENTOMANI, STUART ALLEN	)	
MAGISTRATE JUDGE NOLAN	)	
BARBARA MCCOLGIN, CHRIS J.	)	
MOLLET, ESQ., THOMAS R.	)	
BEARROWS, ESQ., CHRISTINE	)	
FLANINGAM,	)	
	)	
Defendants.	)	

ABSTRACT OF PROPOSED SECOND AMENDED COMPLAINT AT LAW

Plaintiff Demands Trial by Jury

INTRODUCTION

1. This action is brought to obtain redress for the intentional and malicious actions of certain members of the staff of the University of Illinois and the

University of Illinois Medical Center at Chicago who, acting under color of law, conspired to and did retaliate against Plaintiff, Herand Abcarian, M.D., F.A.C.S., for his exercise of his free speech rights guaranteed to him under the First Amendment of the United States Constitution and the Statutes of the University of Illinois, in the form of public criticism of the policies and actions or inactions of certain members of the staff. Dr. Abcarian, a tenure professor and not an at will employee, was not acting pursuant to his official duties in making such statements. Additionally, Defendants denied him his due process protected rights to notice and opportunity to be heard in regard to a complaint of medical negligence brought against him. Although these actions occurred in the workplace, they were not individualized, discretionary actions by his employer, the Board of Trustees of the University of Illinois, that is, they were not "job actions." Further, although these actions involve both his right to due process and his right to equal protection of the laws, his right to relief does not arise as a result of actions taken by his employer acting in an employment relationship, that is, job actions. The perpetrators of the wrongful actions, acting under color of law, had no authority to terminate Dr. Abcarian, to transfer him, to demote him, to add to or reduce his job function or to take or attempt to take any job actions against him and did not take nor attempt to take any such job actions. Neither did his employer, the University of Illinois.

2. In retaliation for Dr. Abcarian's comments, these staff members, Defendants herein, conspired to and arranged for a meritless claim alleging medical negligence to be prosecuted against Plaintiff, settled

such claim as to the University of Illinois in a **settlement to which it has been judicially determined that Plaintiff was not a party, then arranged for the bringing and presentation to the court of the settlement in a sham and pretextual lawsuit for medical negligence against Dr. Abcarian without his knowledge that such lawsuit had ever been filed and after all claims had been settled, and then** *falsely and fraudulently reported* to the Illinois Department of Financial & Professional Regulation, Division of Professional Regulation and the National Practitioner Data Bank ***that a medical negligence case against Plaintiff had been settled. These actions were taken for the sole, illegitimate, malicious purpose of targeting and dishonoring Dr. Abcarian and damaging him in his unblemished license as a physician and his reputation in relation thereto.*** **Defendants acted illegitimately on the basis of personal animus, not on any rational basis.** Defendants thereby caused him to incur considerable expenses to reopen and to attempt to have adjudicated and terminated the false and fraudulent, non-meritorious and pretextual case against him, to respond to investigative demands from the State of Illinois Division of Professional Regulation, the National Practitioner Data Bank and the State of Florida Department of Health, Division of Medical Quality Assurance questioning the status of his license, to suffer severe mental distress and anguish, and personal and professional embarrassment. It was not part of the duties of any of the individual defendants to report settlements of alleged medical negligence matters to the State of Illinois Division of Professional Regulation or the National Practitioner

Data Bank. Plaintiff hereby asserts the following claims against the Defendants in the above-entitled action:

(I) Violation Of 42 U.S.C. § 1983: Free Speech On Matters Of Public Concern

(II) Violation Of 42 U.S.C. §1983: Due Process

(III) Violation Of 42 U.S.C. § 1983: Deprivation Of Liberty And Property Interests

(IV) Violation Of 42 U.S.C. § 1983: Equal Protection Of The Laws

(V) Equitable And Other Relief For Dr. Abcarian's Continuing Damages Arising Out Of Due Process And Equal Protection Violations

(VI) Supplemental Jurisdiction: Breach Of Fiduciary Duties

(VII) Supplemental Jurisdiction: Intentional Infliction Of Acute Mental Distress

(VIII) Supplemental Jurisdiction: Abuse Of Process

(IX) Supplemental Jurisdiction: Libel

JURISDICTION

3. Jurisdiction of this court arises under 28 U.S.C. §§ 1331, 1337, 1343(a), and 1367(a); 42 U.S.C. § 1983, 42 U.S.C. §§ 11131, 11133.

4. Jurisdiction of this court for the pendent or supplemental claims is authorized by 28 U.S.C. sec 1367(a) and F.R.Civ.P. 18(a), and arises under the doctrine of pendent jurisdiction as set forth in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). See also: *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006).

PARTIES

5. Herand Abcarian, M.D., F.A.C.S., at all times material hereto was a tenured, full professor and held the chair as the Turi Josefsen Professor of Surgery at the University of Illinois College of Medicine. He was and is Board Certified by the American Board of Surgery and the American Board of Colon and Rectal Surgery. Among his professional accomplishments, he has been the President of the Illinois State Surgical Society and the Chicago Surgical Society, and has served as the Executive Director of the American Board of Colon and Rectal Surgery. He is also been the President of the American Society of Colon and Rectal Surgeons and the member of the Board of Directors of the American Board of Medical Specialties. He was also a founding member and a member of the Board of Governors of the Society of American Gastrointestinal Endoscopic Surgeons. He has held academic appointments at four institutions, and has otherwise enjoyed an outstanding professional career. He was and is licensed to practice medicine in the State of Illinois and in the State of Florida and is a naturalized citizen of the United States. He has been a member of the medical staff of the University of Illinois Medical Center at Chicago since 1972. He has been President of the Executive Committee of

the Medical Staff, University of Illinois Chicago Medical Center, 2001-2003 and at all times material hereto was employed by and was the Head of the Department of Surgery, University of Illinois College of Medicine at Chicago, and Service Chief of the Department of Surgery of the University of Illinois Medical Center at Chicago located in the Northern District of Illinois in the City of Chicago, County of Cook, State of Illinois and he is a resident of Cook County, Illinois. A copy of his curriculum vitae is attached hereto as Exhibit A. Such curriculum vitae demonstrates that Dr. Abcarian is one of the foremost colo-rectal surgeons in the United States. He is the only living physician to have a lecture series under the auspices of the American College of Surgeons established in his name. Prior to the filing of the lawsuit in the Circuit Court of Cook County, Illinois, County Department, Law Division, styled as DAVID BEHZAD, as Special Administrator for the Estate of JOHN BEHZAD, deceased, Plaintiff, vs. HERAND ABCARIAN, M.D., Defendant, No. 06 L 006172, the fraudulent claim against Dr. Abcarian, no lawsuit alleging medical negligence had been prosecuted against him to settlement or judgment and his reputation, professional standing and unblemished medical license were unquestioned.

6. Dr. Abcarian's professional responsibilities in connection with his employment are solely those assigned to him by the Dean of the College of Medicine of the University of Illinois. At all times material, he reported solely to the Dean and the Dean was the only individual authorized to assign him duties or change his assigned duties. No adverse employment action or job action could be taken against him by any of the Defendants named

in this lawsuit and he could only be involuntarily terminated from his employment by the undertaking of action by the President of the University with the concurrence of the Board of Trustees acting pursuant to the provisions of the Statutes of the University of Illinois. Such Statutes provided for notice and an opportunity to be heard. Specifically, Dr. Abcarian held a tenured academic appointment of indefinite term and could only be removed for "due cause." Due caused is defined under Article X, Section d of the Statutes as:

> "Due cause for dismissal shall be deemed to exist only if *(1)* a faculty member has been grossly neglectful of or grossly inefficient in the performance of the faculty member's university duties and functions; or *(2)* with all due regard for the freedoms and protections provided for in Article X, Section 2, of these Statutes, a faculty member's performance of university duties and functions or extramural conduct is found to demonstrate clearly and convincingly that the faculty member can no longer be relied upon to perform those university duties and functions in a manner consonant with professional standards of competence and responsibility; or *(3)* a faculty member has while employed by the University illegally advocated the overthrow of our constitutional form of government by force or violence."

In view of the foregoing, Dr. Abcarian had a property interest in his tenure and his unblemished medical license and a "present entitlement" to such

unblemished license and to pursue gainful employment as a physician and surgeon.

7. The Statutes of the University of Illinois, which were applicable to Dr. Abcarian and binding upon all Defendants, provided full protection for his right to free speech and public expression of all sorts and in regard to all matters. Specifically, the Statutes provided the following:

"ARTICLE X
ACADEMIC FREEDOM AND TENURE

Section 1. Tenure of Academic Staff

***

Section 2. Academic Freedom

a. It is the policy of the University to maintain and encourage full freedom within the law of inquiry, discourse, teaching, research, and publication and to protect any member of the academic staff against influences, from within or without the University, which would restrict the member's exercise of these freedoms in the member's area of scholarly interest. The right to the protection of the University shall not, however, include any right to the services of the university counsel or the counsel's assistants in any governmental or judicial proceedings in which the academic freedom of the staff member may be in issue.

b. As a citizen, a faculty member may exercise the same freedoms as other citizens without institutional censorship or discipline. A faculty member should be mindful, however,

that accuracy, forthrightness, and dignity befit association with the University and a person of learning and that the public may judge that person's profession and the University by the individual's conduct and utterances.

c. If, in the president's judgment, a faculty member exercises freedom of expression as a citizen and fails to heed the admonitions of Article X, Section 2b, the president may publicly disassociate the Board of Trustees and the University from and express their disapproval of such objectionable expressions.

d. A staff member who believes that he or she does not enjoy the academic freedom which it is the policy of the University to maintain and encourage shall be entitled to a hearing on written request before the Committee on Academic Freedom and Tenure of the appropriate campus senate. Such hearing shall be conducted in accordance with established rules of procedure. The committee shall make findings of facts and recommendations to the president and, at its discretion, may make an appropriate report to the senate. The several committees may from time to time establish their own rules of procedure."

This Statute specifically provides for "full freedom within the law of inquiry, discourse ... and to protect any member of the academic staff against influences, from within or without the University, which would restrict the member's exercise of these freedoms in

the member's area of scholarly interest." Further, this Statute specifically provides: "As a citizen, a faculty member may exercise the same freedoms as other citizens without institutional censorship or discipline."

In view of the foregoing, Dr. Abcarian was protected from any individual subjective personnel decisions, that is, adverse "job action" in regard to any statements he might make. All such statements are established by the Statutes of the University of Illinois to be not a part of the professional responsibilities of a faculty member but rather statements made by a "citizen" ... "who may exercise the same freedoms as other citizens without institutional censorship or discipline."

8. Defendants are all natural persons and employees of the University of Illinois and they are sued in their individual capacity.